

Building a Protective Wall Around Terrorists –  
How the International Court of Justice’s  
Ruling in The Legal Consequences of the  
Construction of a Wall in the Occupied  
Palestinian Territory Made the World Safer for  
Terrorists and More Dangerous for Member  
States of the United Nations

Rebecca Kahan\*

\*

# Building a Protective Wall Around Terrorists – How the International Court of Justice’s Ruling in The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations

Rebecca Kahan

## **Abstract**

Part I of this Note will examine two recent actions in the war against international terrorism: the Israeli plan to build a separation barrier between Israel and the OPT, and the invasion of Afghanistan during Operation Enduring Freedom. Part II will discuss two important deviations by the ICJ from past interpretation of international law that were announced in the advisory proceedings against Israel: a new elucidation by the ICJ regarding principles of judicial propriety and a new analysis of the abilities of States to act in self-defense under Article 51 of the U.N. Charter. Part III will address the impact on the international community’s fight against terrorism, and the role of the ICJ as an international entity.

BUILDING A PROTECTIVE WALL AROUND TERRORISTS  
— HOW THE INTERNATIONAL COURT OF JUSTICE'S  
RULING IN *THE LEGAL CONSEQUENCES OF THE  
CONSTRUCTION OF A WALL IN THE OCCUPIED  
PALESTINIAN TERRITORY* MADE THE WORLD SAFER FOR  
TERRORISTS AND MORE DANGEROUS FOR MEMBER  
STATES OF THE UNITED NATIONS

Rebecca Kahan\*

INTRODUCTION

The nature of the threats posed to States has changed since the adoption of the U.N. Charter.<sup>1</sup> In recent decades, the international community has become more aware of the threat posed by international terrorism.<sup>2</sup> For years, the international commu-

---

\* J.D. Candidate, 2006, Fordham University School of Law; *Fordham International Law Journal*, Writing and Research Editor, Volume XXIX; B.A. Economics, 2003, University of Pennsylvania. The author would like to give special thanks to Wynne Kelly, Josephine Liu, Shaun Reader, Dina Ehrenburg, and Desma Polydorou for all of their assistance.

1. See Barry A. Feinstein, *A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet them*, 17 *TRANSNAT'L L.* 51, 55, 67-68 (2004) (commenting that international community recognizes that new reality of nature of terrorist organizations requires new thinking in order for States to protect citizens, and concluding that attacks by terrorist group against State constitutes armed attack because nothing in U.N. Charter states that attacks must be attributed to State and because Article 51 of U.N. Charter was drafted in broad enough manner to permit its application to attacks perpetrated by terrorist organizations); see also Matthew Scott King, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-Up International War Crimes?*, 9 *ILSA J. INT'L & COMP. L.* 457, 471 (2003) (noting that modern threats of warfare require that interpretations of Article 51 of U.N. Charter include acts of international terrorism, particularly to prevent States from supporting acts of terrorism to wage war against their enemies); Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 *HARV. J.L. & PUB. POL'Y* 737, 761-62 (2004) (concluding that in 21st Century international community has come to accept use of force against non-State actors so long as all requirements of self-defense have been met and arguing that acceptance of Operation Enduring Freedom by international community demonstrates appreciation of emergence of new international terrorism and that American strategy is consistent with this shift) [hereinafter Schmitt, *Assessment*]; Carsten Stahn, *Terrorist Attacks as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27-FALL *FLETCHER F. WORLD AFF.* 35, 35-36 (2003) (commenting that drafters of U.N. Charter left concept of armed attack open to interpretation of Member States).

2. See Jaume Saura, *Some Remarks on the Use of Force Against Terrorism in Contemporary International Law*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 7, 8 (2003) (noting that international community has become more aware of threat posed by terrorism since 1960s); see also Maj'r Joshua E. Kastenberg, *The Use of Conventional International Law in Combating*

nity has embraced the idea that targeting civilians violates principles of international law; however, terrorist organizations have adopted this strategy as part of their policy.<sup>3</sup> In order to protect its citizens, States need to adapt their security policies to the new threats, and the new adversaries they face.<sup>4</sup> Many terrorist groups, particularly religious-based groups, no longer rely on State sponsorship.<sup>5</sup> Scholars of terrorism conclude that many militant Islamic groups are moving toward complete independence.<sup>6</sup>

---

*Terrorism: A Maginot Line for Modern Civilization Employing Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87, 105 (2004) (concluding that while international law regarding use of force was originally designed to regulate interstate warfare in order to protect civilians from atrocities of war, law should be applied to terrorist attacks as well because such acts should not be tolerated when there is existing framework to review illegal acts); Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT'L L. 981, 982 (2004) (explaining that religion is important in international politics and that non-State actors cause conflicts that take heaviest toll on sovereign States); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 139 (2004) (stating that international leaders believe that threat of international terrorism will grow in future).

3. See Kastenberg, *supra* note 2, at 100, 105 (noting that one distinctive difference between legitimate use of military force and terrorist activity is willingness of terrorists to carry out acts of violence against civilians, and concluding that terrorist organizations violate principles of international law that other States are forced to abide by, including principle that civilians should not be targeted during military operations); see also Feinstein, *supra* note 1, at 55 (explaining that terrorists demonstrate disregard for international law and moral codes while hiding behind rules and codes that prevent other international actors from protecting themselves).

4. See Schmitt, *Assessment*, *supra* note 1, at 754 (explaining that for centuries, international law has recognized that States should not be forced to suffer attack to act in self-defense and that in order for States to create policy to prevent those threats they must be able to adapt concept of threat in face of types of weapons new adversaries use); see also Kastenberg, *supra* note 2, at 105 (concluding that international laws of war were designed to regulate interstate warfare and terrorist acts were intended to circumvent those norms and that international legal norms that already exist should be adapted to bear upon new acts); Feinstein, *supra* note 1, at 55 (explaining that new reality of terrorism requires that existing framework of law be adapted in manner capable of incorporating new threats posed by international terrorism and access to weapons of mass destruction).

5. See Kastenberg, *supra* note 2, at 100-01 (explaining that many modern terrorist groups do not depend on support from States, particularly those that are religious-based); see also Josh Kastenberg, *The Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy on Determination on Unlawful Combatant Status for Terrorists Run Afoul of International Law, or is it Just Poor Public Relations?*, 39 GONZ. L. REV. 495, 510-11 (2003-2004) (concluding that many terrorist organizations have moved away from direct State-sponsorship).

6. See Kastenberg, *supra* note 2, at 102 (arguing that many scholars conclude that fundamentalist Islamic groups are becoming less reliant on State support, potentially allowing them to pursue more violent acts). See generally Edgardo Rotman, *The Globaliza-*

The United Nations has taken action to draw attention to the threats posed by international terrorism and to enact measures designed to suppress the capabilities of terrorist organizations.<sup>7</sup> In 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism which stated that the General Assembly was determined to eliminate international terrorism of all types.<sup>8</sup> In 1999, the Security Council passed Resolution 1269 which condemned all acts of terrorism, regardless of their origin, and stated that they pose a threat to international peace and security.<sup>9</sup> Furthermore, in 2001, the Security Council issued Resolutions 1368 and 1373 condemning all acts of international terrorism, reiterating the need for States to prevent and suppress acts of international terrorism, affirming that it is illegal to assist, finance, or harbor terrorist organizations, and creating a subsidiary body of the Security Council to

---

*tion of Criminal Violence*, 10 CORNELL J. L. & PUB. POL'Y 21 (2000) (arguing that increased globalization has allowed international actors to obtain more deadly weapons and orchestrate more massive attacks).

7. See S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053rd mtg., U.N. Doc. S/RES/1269 (1999) (encouraging Members to take action against international terrorists); *see also*, S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001) (condemning attacks that occurred on September 11th, 2001 ("September 11th attacks") against United States and calling on international community to fight against international terrorism); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) (affirming right of self-defense and creating subsidiary body to monitor progress in fight against terrorism); *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/60 (1994) (finding that acts designed to instigate terror in public are unjustifiable and calling on States to refrain from participating in any way in organization of such acts); *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. Res/51/210 (1996) (affirming position of General Assembly taken in Resolution 49/60).

8. See G.A. Res. 49/60, *supra* note 7 (declaring that General Assembly was dedicated to eradicating all acts of international terrorism); *see also* Feinstein, *supra* note 1, at 62-63 (noting that General Assembly adopted Resolution 49/60 which adopted Declaration on Measures to Eliminate International Terrorism in which General Assembly stated that acts of international terrorism threaten security of all States); Saura, *supra* note 2, at 13 (stating that General Assembly has indicated willingness to address threats posed by international terrorists, position it adopted in Resolutions 46/90 and 51/210).

9. See S.C. Res. 1269, *supra* note 7 (condemning acts of international terrorism and stating that they pose threat to international peace and security); *see also* Feinstein, *supra* note 1, at 64 (noting that Security Council passed Resolution 1269 because of concern that acts of international terrorism affect peace and security of all States); Saura, *supra* note 2, at 16 (explaining that Security Council Resolution 1269 viewed international terrorism as new threat to peace and security, but that resolution was adopted without specific reference to any case).

monitor the implementation of Resolution 1373.<sup>10</sup>

Recently, both Israel and the United States have implemented plans designed to end a series of attacks against their citizens by international terrorists.<sup>11</sup> Israel planned to build a separation barrier between its territory and the Occupied Palestinian Territory ("OPT") as an effort to decrease the number of cross Green-Line attacks.<sup>12</sup> The United States began Operation Enduring Freedom following the attacks on September 11th, 2001, ("September 11th attacks") in response to a series of strikes against military and civilian targets by the al Qaeda terrorist organization.<sup>13</sup>

---

10. See S.C. Res. 1368, *supra* note 7 (expressing sympathy for victims of September 11th attacks, affirming right to self-defense and Resolution 1269, and calling on States to fight international terrorism); see also S.C. Res. 1373, *supra* note 7 (affirming Resolution 1269, right to self-defense, threat posed by international terrorism, and calling on States to take all action necessary to fight international terrorism, and creating subsidiary body of United Nations charged with duty to oversee actions taken to suppress international terrorism).

11. See *Report of the Secretary General prepared pursuant to General Assembly Resolution ES-10/13*, U.N. GAOR, 10th Emergency Special Sess., Ann. I, ¶¶ 4-5, U.N. Doc A/ES-10/248 (2003) [hereinafter *Report Prepared Pursuant to ES-10/13*] (reporting that government of Israel had considered plans to stop infiltration into Israel and approved first phase of construction of separation barrier in 2002); see also Letter from John D. Negroponte, Permanent Representative of the United States, to the President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/946, available at <http://www.un.int/usa/s-2001-946.htm> (stating that Operation Enduring Freedom was launched in self-defense against terrorist acts and that United States did not seek approval of United Nations for this reason).

12. See *Report Prepared Pursuant to ES-10/13*, *supra* note 11, Ann. I, ¶¶ 4-5 (observing that government of Israel approved first phase of construction of separation barrier in 2002 as method to prevent infiltration into Israel); see also Nicole Trudeau, *ICJ to Give an Advisory Opinion Regarding Israel's Barrier*, 11 (2) HUM. RTS. B. 34, (2004) (noting that Israeli government approved plan after steady increase in terrorist attacks); Anti-Defamation League, *Decision Dismisses Israel's Arguments, Accepts Palestinian Claims Without Reservation*, July 9, 2004, available at [http://www.adl.org/Israel?court\\_of\\_justice.asp](http://www.adl.org/Israel?court_of_justice.asp) (describing separation barrier as security measure implemented to prevent terrorists from reaching targets inside Israel) [hereinafter *Decision Dismisses Israel's Arguments*]; Aaron Klein, *Hague-wash: Court of "Justice" Ruling a Joke!*, July 14, 2004, available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=39439](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=39439) (noting that terrorists blame separation barrier for their inability to carry out attacks).

13. See King, *supra* note 1, at 463 (explaining that September 11th attacks were not isolated incident, but were part of series of attacks by al Qaeda against United States); see also Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L.J. 533, 533 (2002) (listing attacks against U.S.S. Cole, U.S. embassies in Kenya and Tanzania, and World Trade Center as some in series of terrorist attacks perpetrated by al Qaeda against United States); Saura, *supra* note 2, at 14 (noting that Taliban Government and al Qaeda were accused of orchestrating bombings of U.S. embassies in Kenya and Tanzania).

The international community criticized Israel's decision to build the separation barrier.<sup>14</sup> The General Assembly asked the International Court of Justice ("ICJ") to render an advisory opinion regarding the consequences of the construction of the segments of the separation barrier that crossed the internationally accepted boundary between Israel and the OPT.<sup>15</sup> On July 9, 2004, the ICJ issued an advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Construction of a Wall Case*").<sup>16</sup> In its lengthy opinion, the ICJ addressed many relevant principles of international law, including

---

14. See *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, U.N. GAOR, 10th Sess., U.N. Doc. A/RES/ES-10/13 (2003) (condemning construction of separation barrier and demanding that Israel cease and reverse its construction); see also Press Release, General Assembly Adopts Text Requesting International Court of Justice to Issue Advisory Opinion on West Bank Separation Wall, U.N. Doc. GA/10216 (Dec. 8, 2003), available at <http://www.un.org/News/Press/docs/2003/ga10216.doc.htm> [hereinafter Press Release 10216] (giving statements of those who voted in favor of request for advisory opinion); Press Release, International Meeting on Impact of Wall Built by Israel in Occupied Palestinian Territory, U.N. Doc. GA/PAL/953, (Apr. 16, 2004), available at <http://www.un.org/News/Press/docs/2004/ga10216.doc.htm> (noting concern of participants of International Meeting on Impact of Wall Built by Israel in Occupied Palestinian Territory ("OPT") regarding potential humanitarian impact of separation barrier) [hereinafter GA/PAL/953].

15. See *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, U.N. GAOR, 10th Sess., U.N. Doc. A/RES/ES-10/14 (2003) [hereinafter ES-10/14] (stating that General Assembly is gravely concerned with construction of segments of separation barrier that depart from Green Line and requesting that ICJ render advisory opinion regarding legal consequences of separation barrier being built by Israel); see also Press Release 2003/42, The General Assembly of the United Nations Requests an Advisory Opinion from the Court on the Legal Consequences Arising from the Construction by Israel of a Wall in the Occupied Palestinian Territory, (Dec. 10, 2003), available at [http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-42\\_xx\\_20031210.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-42_xx_20031210.htm) [hereinafter Press Release 2003/42] (noting receipt by ICJ of General Assembly's request); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 43 I.L.M. 1009, 1011-12, 1029, ¶¶ 1, 67 (July 9, 2004) [hereinafter *Construction of a Wall Case*] (noting that question to which case responded was set out in General Assembly Resolution ES-10/14 and that because request concerned legal consequences of separation barrier being built in OPT, it would only address those portions of separation barrier); *Summary of the Advisory Opinion of 9 July 2004*, International Court of Justice Summary 2004/2 (July 9, 2004) available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> [hereinafter *Summary of Advisory Opinion*] (noting that ICJ determined that scope of its jurisdiction only covered portions of separation barrier that crossed Green Line and were thus outside of Israel).

16. See *Construction of a Wall Case*, 43 I.L.M. at 1054-56, ¶ 163 (finding separation barrier illegal and finding that Israel must stop construction); see also Press Release 2004/28, The Court finds that the Construction by Israel of a Wall in the Occupied Palestinian Territory and its Associated Regime are Contrary to International Law, (July 9, 2004) [hereinafter Press Release 2004/28] (summarizing findings of ICJ).

those of judicial propriety.<sup>17</sup> By finding no reason to exercise discretion, the ICJ departed from past interpretations of the duty to exercise discretion when giving an advisory opinion.<sup>18</sup> The *Construction of a Wall Case*, however, failed to recognize the security threat posed by terrorists that are not associated with a State.<sup>19</sup> By omitting such a discussion, the ICJ called into question what had been considered legitimate security policies of many States, particularly of the United States in Operation Enduring Freedom.<sup>20</sup> While neither Operation Enduring Free-

---

17. See *Construction of a Wall Case*, 43 I.L.M. at 1016-29, ¶¶ 13-65 (noting that ICJ addressed jurisdiction first); see also *Summary of Advisory Opinion*, *supra* note 15 (noting that jurisdiction issues spanned Paragraphs 13-65 of Opinion).

18. See *Construction of a Wall Case*, 43 I.L.M. at 1016-29, ¶¶ 13-65 (discussing relevant principles of judicial propriety but noting that none applied to case at bar); see also Fr. Robert J. Araujo, S.J., *Implementation of the ICJ Advisory Opinion -- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 B.U. INT'L L.J. 349, 361 (2004) (questioning whether decision to grant advisory opinion was abuse of judicial discretion); Joshua Rozenberg, *UN Judges are Urged to Sit on the Fence Britain and America say the International Court of Justice Should Decline to Give an Opinion on the Legitimacy of Israel's 400-mile Barrier*, DAILY TELEGRAPH, Feb. 12, 2004, available at 2004 WL 68217170 (explaining that United States and United Kingdom find that ICJ had previously determined several situations in which it is inappropriate to give advisory opinion, that all were present in *Construction of a Wall Case*, and that ICJ decided to grant request for advisory opinion even though it violated principles that ICJ had previously articulated).

19. See *Construction of a Wall Case*, 43 I.L.M. at 1063-64, ¶¶ 33-34 (separate opinion of Higgins, J.) (noting reservations regarding ICJ's interpretation of applicability of Article 51 of U.N. Charter); see also *id.* at 1097, ¶ 27 (separate opinion of Owada, J.) (noting importance of considering separation barrier as part of situation in Middle-East with long history); *id.* at 1078-79, ¶¶ 3, 5 (declaration of Buergenthal, J.) (stating that Israel's security concerns were never addressed and noting importance of addressing separation barrier in context of deadly attacks that have occurred against citizens of Israel); *id.* at 1068, ¶ 12 (separate opinion of Kooijmans, J.) (observing that ICJ never put protections potentially afforded by separation barrier in context of dispute and that ICJ stated importance of regarding context of dispute as whole but never did it); *Israel Must Ignore the ICJ*, NAT'L POST, July 10, 2004, available at 2004 WL 85151438 [hereinafter *National Post*] (concluding that word "terrorism" never appears in opinion in *Construction of a Wall Case*); *What the Court Advisory Opinion Does and Does Not Say*, JUL. 23, 2004, available at [http://www.adl.org/Israel/court\\_of\\_justice\\_analysis.asp](http://www.adl.org/Israel/court_of_justice_analysis.asp) [hereinafter *What the Court Advisory Opinion Does and Does not Say*] (noting that ICJ did not address defensive role of barrier); Steven Lubet, *Lack of Regard Shown for Israel's Concerns*, CHIC. TRIB., July 13, 2004, available at 2004 WL 86077711 (finding that treatment of security issue was dismissive and that ICJ never put protections afforded by separation barrier in context of larger, ongoing dispute); Dan Ephron, *World Court Rules Israeli Barrier Illegal*, BOSTON GLOBE, July 10, 2004 (remarking that even opponents of separation barrier believed issue was not addressed appropriately).

20. See Lubet, *supra* note 19 (noting that logic of ICJ in *Construction of a Wall Case* would indicate that United States would not be justified in acting against al Qaeda, but such action was permitted by Security Council in Resolutions 1368 and 1373); see also A



dom, nor any other action during the war on terrorism has been challenged, the combination of this discussion and omission raises many issues for all States regarding their ability to create national security policies against terrorism without fear of falling within ICJ jurisdiction.<sup>21</sup>

Part I of this Note will examine two recent actions in the war against international terrorism: the Israeli plan to build a separation barrier between Israel and the OPT, and the invasion of Afghanistan during Operation Enduring Freedom. Part II will discuss two important deviations by the ICJ from past interpretation of international law that were announced in the advisory proceedings against Israel: a new elucidation by the ICJ regarding principles of judicial propriety and a new analysis of the abilities of States to act in self-defense under Article 51 of the U.N. Charter. Part III will address the impact on the international community's fight against terrorism, and the role of the ICJ as an international entity.

### I. FIGHTING THE INTERNATIONAL WAR ON TERRORISM: THE RIGHT TO SELF-DEFENSE

The U.N. Charter mandates that States refrain from the use or threat of force against other States in their international rela-

---

*New U.N. Assault on Israel*, WALL ST. J. EUR., July 12, 2004, available at 2004 WL-WJSE 56869961 [hereinafter *New U.N. Assault*] (stating that opinion in *Construction of a Wall Case* had potential to challenge justifications used by United States in entering war on terror).

21. See *Decision Dismisses Israel's Arguments*, *supra* note 12 (last visited March 15, 2005) (noting that opinion in *Construction of a Wall Case* may provide precedent for ICJ to bring sovereign States before ICJ and force State to defend policy before ICJ); see also Ruth Wedgewood, *Ill-Advised Advisory*, ASIAN W. ST. J., Feb. 19, 2004, available at 1004 WL-WSJA 56590771 (positing that to allow ICJ to intrude into policy matters of States will affect international community's perception of different conflicts); Andrew C. McCarthy, *The End of the Right of Self-defense? Israel, the World Court, and the War on Terror*, COMMENT., Nov. 1, 2004, at 17, available at 2004 WL 62917018 (arguing that decision to hear case potentially undermines integrity of ICJ and integrity of international law, and stating that decision changes role of ICJ because ICJ allows liberal submissions by non-parties during advisory proceedings, allowing all nations to become involved in addressing policy determinations of other States); Ruth Wedgewood, *White Paper on the International Court of Justice and the Israeli "Fence": The General Assembly Referral on "Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory"*, Feb. 23, 2004, available at [http://defenddemocracy.org/publications/publications\\_show.htm?doc\\_id=212024](http://defenddemocracy.org/publications/publications_show.htm?doc_id=212024) [hereinafter *Comments on White Paper*] (explaining that allowing ICJ to become involved in such matters, United Nations engages entire international community because in advisory proceedings submissions are allowed by non-parties).

tions.<sup>22</sup> Article 51, however, provides an exception to this limitation.<sup>23</sup> It proclaims that nothing in the U.N. Charter will impair the inherent right of States to act in individual or collective self-defense.<sup>24</sup> This article of the U.N. Charter enumerates certain requirements that States must meet when acting in self-defense, including that a State must be acting in response to an armed attack, must report its actions to the Security Council, and the use of force must not impair the ability of the Security Council to restore international peace and security.<sup>25</sup>

### A. *Two Recent Policy Decisions Regarding the War on Terrorism*

Two recent responses to the war against terror have come from different parts of the world: Israel during the *al Aqsa Intifada*; and the United States against al Qaeda.<sup>26</sup> Although the

---

22. See U.N. CHARTER art. 2, ¶ 4 (stating that all Members will refrain from use of force in international relations); see also Judgment of Nov. 6, 2003, *Oil Platforms* (Iran v. U.S.), ¶ 43, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_jjudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_jjudgment_20031106.PDF) (noting that ICJ would have to analyze right to self-defense within confines of prohibition against use of force) [hereinafter *Oil Platforms Case*]; King, *supra* note 1, at 459 (stating that Article 2(4) of U.N. Charter mandates that States refrain from use of force when settling international disputes).

23. See U.N. CHARTER art. 51 (providing that States may use force in act of self-defense); see also King, *supra* note 1, at 459-60 (noting that framers of U.N. Charter recognized long-established right to self-defense and provided that States could use self-defense to protect their citizens).

24. See U.N. CHARTER art. 51 (stating that nothing in U.N. Charter shall prevent States from exercising right to self-defense); see also King, *supra* note 1, at 460 (concluding that framers of U.N. Charter provided exception to general prohibition against use of force and stated that nothing in the Charter would hamper inherent right of State to act in individual or collective self-defense).

25. See U.N. CHARTER art. 51 (requiring that for action in self-defense to be valid, it must be in response to armed attack, must be reported to Security Council, and must not affect Security Council's efforts to maintain international peace and security); see also Schmitt, *Assessment*, *supra* note 1, at 750-51 (explaining that for State to act under Article 51 of U.N. Charter it must have been victim of armed attack and must report its actions to Security Council, although does not have to seek approval of Security Council); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 553-54 (2002) (observing that State is only permitted to act in self-defense under Article 51 of U.N. Charter if its actions do not impair ability of Security Council to maintain international peace and security).

26. See *Report Prepared Pursuant to ES-10/13*, *supra* note 11, Ann. I ¶¶ 4-5 (reporting that government of Israel had considered plans to cease infiltration into Israel and approved first phase of construction of separation barrier in 2002); see also Letter from John D. Negroponte, *supra* note 11 (stating that Operation Enduring Freedom was launched in self-defense against terrorist acts and United States did not seek approval of United Nations for this reason).

terrorist organizations were different, the acts of terror were very similar: they were aimed at destroying the lives of innocent civilians.<sup>27</sup> Furthermore, the origin of the attacks was similar: they can be attributed to religious based organizations whose leaders are not part of any State's government.<sup>28</sup> Both Nations claim to have acted in self-defense in an effort to protect their citizens.<sup>29</sup>

### 1. The Israeli Separation Barrier

Many of the cross-border attacks have been attributed to a terrorist organization known as Hamas.<sup>30</sup> In 1987, a group of Palestinians living in the area controlled by Israel after the Six-Day War began a series of attacks known as the *Intifada*.<sup>31</sup> Although there was a period of peace, the second *Intifada*, the *al*

---

27. See Sara Roy, *Religious Nationalism and the Palestinian-Israeli Conflict: Examining Hamas and the Possibility of Reform*, 5 CHI. J. INT'L L. 251, 251 (2004) (stating that terrorist organization Hamas perpetrated many suicide bombings against Israeli citizens at start of *al Aqsa Intifada*); see also Sadat, *supra* note 2, at 139 (stating that as part of Operation Enduring Freedom, United States has taken action to help deter and prevent attacks by taking measures against al Qaeda); Kastenbergs, *supra* note 2, at 104 (noting that Hamas charter instructs members to kill non-believers who rule over Muslims); Philpott, *supra* note 2, at 987 (stating that September 11th attacks were carried out by Islamic revivalists who have commenced *jihad*, or religious war, against United States); Feinstein, *supra* note 1, at 55 (explaining that terrorists demonstrate disregard for international law and for moral codes while hiding behind rules and codes that prevent other international actors from protecting themselves).

28. See Philpott, *supra* note 2, at 988 (stating that al Qaeda is non-State affiliated terrorist organization that organizes *jihad* for global Islamic community); see also Amitai Etzioni, *Hamas*, available at <http://www.mideastweb.org/hamas.htm> (explaining that Hamas formed separately from Palestinian Liberation Organization ("PLO") and was organized to carry out attacks against Israelis) (last visited Mar. 15, 2005).

29. See Report Prepared Pursuant to ES-10/13, *supra* note 11, Ann. I, ¶¶ 4-5 (reporting that government of Israel had considered plans to cease infiltration into Israel and approved first phase of construction of separation barrier in 2002); see also Letter from John D. Negroponte, *supra* note 11 (stating that Operation Enduring Freedom was launched in self-defense against terrorist acts and did not seek approval of United Nations for this reason).

30. See Roy, *supra* note 27, at 259 (noting that Hamas was involved in attacks during *al Aqsa Intifada*); see also John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77, 83-84 (2002) (noting that suicide bombings have been used in conflict between Israel and Palestine and that when Hamas uses such tactics it is regarded under international norms as act of terrorism) [hereinafter Cohan, *Formulation*].

31. See Hamas, *supra* note 28 (explaining that Hamas formed separately from PLO and was organized to carry out attacks against Israelis); see also Russell Korobkin & Johnathan Zasloff, *Roadblocks to the Roadmap: A Negotiation Theory Perspective on the on the Israeli-Palestinian Conflict after Yassar Arafat*, 30 YALE J. INT'L L. 1, 29 (2005) (stating that Hamas and PLO are different organizations); Karina Sandberg, *A Horse is a Horse, of Course? Israel and the United Nations' Conference on Racism*, 12 TRANSNAT'L L. & CONTEMP.

*Aqsa Intifada*, began in September 2000.<sup>32</sup> The Charter of Hamas contains a commandment that supports killing all non-believers who govern Muslims regardless of their political affiliation, and to liberate the holy land controlled by Israel.<sup>33</sup>

The Palestinian Liberation Organization ("PLO") has also participated in the *al Aqsa Intifada* and is responsible for many of the attacks against Israeli citizens.<sup>34</sup> The PLO was created in 1964 with support from Egypt, but eventually Yassar Arafat assumed leadership.<sup>35</sup> The United Nations has granted the PLO observer status as the legitimate representative of the Palestinian people, but they are not officially recognized as a State.<sup>36</sup>

The Israeli government decided on April 14, 2002, to build a system of barriers, ditches, fences, and walls<sup>37</sup> in response to

PROBS. 245, 251 (2002) (noting that immediately following Six-Day War, Palestinians launched series of attacks known as Intifada).

32. See Korobkin & Zasloff, *supra* note 31, at 3 (noting that second intifada began in September 2000 reinstating a war between Israel and Palestine); see also Roy, *supra* note 27, at 251 (stating that Hamas perpetrated many suicide bombings against Israeli citizens at start of *al Aqsa Intifada*).

33. See The Covenant on the Islamic Resistance Movement (Hamas) (Aug. 18, 1998), available at <http://www.mideastweb.org/hamas.htm> (stating as one of its missions the creation of *jihad*, or holy war, to gain control of holy land from Israel); see also Kastenbergh, *supra* note 2, at 104 (noting that Hamas charter instructs members to kill non-believers who rule over Muslims); Roy, *supra* note 27, at 252-53 (explaining that Hamas is Islam based political organization whose influence has evolved through use of force against Israelis).

34. See Roy, *supra* note 27, at 252 (noting that PLO participated in *al Aqsa Intifada*); see also Frances Raday, *Self-Determination and Minority Rights*, 26 *FORDHAM INT'L L.J.* 453, 473 (2003) (explaining that militant wing of PLO has been held responsible for many of attacks that were part of *al Aqsa Intifada*).

35. See Amitai Etzioni, Palestinian Organizations, available at <http://www.mideastweb.org/palestinianparties.htm#PLO> (stating that PLO was established by Egypt but was taken over by Yassar Arafat) (last visited Mar. 15, 2005); see also Kyle C. Olive, *Finding Common Ground, the Missing Pieces of Middle East Peace*, 2 *SEATTLE J. SOC. JUST.* 415, 417 (2004) (observing that PLO was formed as umbrella group for various guerilla campaigns organized by Israel's Arab neighbors and was taken over by Yassar Arafat after Six-Day War).

36. See *Palestinian Organizations*, *supra* note 35 (noting that United Nations granted PLO observer status); see also *Construction of a Wall Case*, 43 *I.L.M.* 1009, 1054-56, ¶ 4 (July 9, 2004) (observing that General Assembly granted PLO observer status during proceedings that led to adoption of request for advisory opinion in *Construction of a Wall Case*).

37. See *Dossier: Materials Compiled Pursuant to Article 65, paragraph 2, of the Statute of the International Court of Justice (Request for Advisory Opinion by the International Court of Justice Pursuant to General Assembly Resolution A/ES-10/14)*, ¶ 3 (Jan. 19, 2004), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> [hereinafter *Dossier*] (stating that Israel decided to build barrier in April 2002); see also Trudeau, *supra* note 12 (noting that increased number of attacks by Palestinian terrorists during Spring of

the numerous cross Green-Line attacks against Israeli citizens.<sup>38</sup> Originally, the plan for the separation barrier ran along the Green Line,<sup>39</sup> which the international community has come to accept as Israel's border with the OPT.<sup>40</sup> The Israeli Cabinet, however, voted in October 2003 to expand the project.<sup>41</sup> These extended portions of the barrier deviated from the path of the Green Line, and resulted in surrounding roughly 15% of the West Bank to protect enclaves of Israeli settlements.<sup>42</sup>

The international community criticized the decision to

---

2002 led to Israel's approval of construction of 80 kilometers of Barrier in three portions of West Bank); Press Release 10216, *supra* note 14 (noting that Secretary General recognized right and duty of Israel to protect citizens from terror attacks and that separation barrier was built in response to terror attacks that originated in Palestine); *Report Prepared Pursuant to ES-10/13*, *supra* note 11, ¶ 5 (noting that Israeli Government decided to build separation barrier to prevent infiltration of terrorists).

38. See Trudeau, *supra* note 12 (noting that Israeli government approved plan after steady increase in terrorist attacks); see also *Report Prepared Pursuant to ES-10/13*, *supra* note 11, ann. I ¶¶ 4-5 (reporting that government of Israel had considered plans to cease infiltration into Israel and approved first phase of construction of separation barrier in 2002); *Decision Dismisses Israel's Arguments*, *supra* note 12 (describing separation barrier as security measure implemented to prevent terrorists from reaching targets inside Israel); Klein, *supra* note 12 (noting that terrorists blame separation barrier for their inability to carry out attacks).

39. See Trudeau, *supra* note 12 (noting that original plan followed Green Line); see also *ICJ Advisory Opinion on Israeli Security Fence*, 98 AM. J. INT'L L. 361, 361 (2004) (Sean D. Murphy, ed.) (noting that in Spring of 2002, government of Israel began construction of security barrier along Green Line) [hereinafter *ICJ Advisory Opinion on Israeli Security Fence*].

40. See Trudeau, *supra* note 12 (noting that international community recognizes Green Line as Israel's border); see also Christian Hauswaldt, *Problems Under the EC — Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip Under the EC — Israel Association Agreement*, 14 EUR. J. INT'L LAW 591, 600 (2003) (noting that Green Line is recognized by most States as Israel's border).

41. See *Report Prepared Pursuant to ES-10/13*, *supra* note 11, ¶ 6 (noting that Israeli cabinet voted to expand project); see also Trudeau, *supra* note 12 (noting that on October 23, 2003, government of Israel approved portion of route that would deviate from Green Line); Amitai Etzioni, *Israel's Security Barrier Could Use Tweaking, Not a Wrecking Ball*, USA TODAY, Aug. 4, 2004, available at 2004 WL 58561681 (noting that only 15% of barrier's path would have to be shifted in order for path to follow Green Line) [hereinafter Etzioni, *Tweaking*]; *ICJ Advisory Opinion on Israeli Security Fence*, *supra* note 39, at 361 (noting that path of separation barrier was extended on October 23, 2003 to encompass portions of West Bank).

42. See *Report Prepared Pursuant to ES-10/13*, *supra* note 11, ¶ 8 (stating that 975 square kilometers, or 16.6% of West Bank would lie between separation barrier and Green Line, an area that is home to approximately 17,000 Palestinians in West Bank and 220,000 in East Jerusalem); see also *ICJ Advisory Opinion on Israeli Security Fence*, *supra* note 39, at 361 (noting that extension would intrude into approximately 15% of West Bank); Etzioni, *Tweaking*, *supra* note 41 (noting that only 15% of barrier's path would have to be shifted in order for path to follow Green Line).

build the separation barrier.<sup>43</sup> The U.N. General Assembly condemned the separation barrier and requested that Israel cease construction.<sup>44</sup> Furthermore, it requested that the ICJ issue an advisory opinion regarding the consequences of the separation barrier.<sup>45</sup> The request for an opinion only involved those portions of the separation barrier that deviated from the Green Line.<sup>46</sup> The ICJ rendered its opinion regarding the legal consequences of the construction of the separation barrier in the OPT on July 9, 2004.<sup>47</sup>

Israel contended that it built the separation barrier in light of the right to self-defense provided for in the U.N. Charter.<sup>48</sup>

43. See G.A. Res. ES-10/13, *supra* note 14 (condemning construction of separation barrier and demanding that Israel cease and reverse its construction); see also Press Release 10216, *supra* note 37 (giving statements of those who voted in favor of request for Advisory Opinion); GA/PAL/953, *supra* note 14 (noting concern of participants of International Meeting on Impact of Wall Built by Israel in OPT regarding potential humanitarian impact of separation barrier).

44. See G.A. Res. ES-10/13, *supra* note 14, ¶¶ 1, 3 (demanding that Israel cease construction and tear down portions that had been completed and requesting that Secretary General write report on Israel's compliance); see also *Construction of a Wall Case*, 43 I.L.M. 1009, 1018, ¶ 21 (July 9, 2004) (noting that General Assembly adopted Resolution ES-10/13 which demanded that Israel cease construction and requested report on compliance); *Report Prepared Pursuant to ES-10/13*, *supra* note 11 (remarking that General Assembly requested report in ES-10/13 in which General Assembly condemned construction of separation barrier).

45. See G.A. Res. ES 10/14, *supra* note 15 (requesting that ICJ render advisory opinion regarding legal consequences of separation barrier being built by Israel); see also *Construction of a Wall Case*, 43 I.L.M. at 1009, ¶ 1 (stating that question to which advisory opinion responded in *Construction of a Wall Case* was set out in ES-10/14); Press Release 2003/42, *supra* note 15 (noting receipt by the ICJ of the General Assembly's request).

46. See G.A. Res. ES 10/14, *supra* note 15 (stating that General Assembly is gravely concerned with construction of separation barrier in areas that depart from Green Line); see also *Construction of a Wall Case*, 43 I.L.M. at 1029, ¶ 67 (noting that because request concerns legal consequences of separation barrier being built in OPT, ICJ will only address those portions of separation barrier); *Summary of Advisory Opinion*, *supra* note 15 (observing that ICJ determined that scope of its jurisdiction only covered portions of separation barrier that crossed Green Line and were thus outside of Israel).

47. See *Construction of a Wall Case*, 43 I.L.M. 1009, (July 9, 2004) (giving advisory opinion of ICJ); see also *Court Will Render its Advisory Opinion on Friday 9 July 2004*, at 3 p.m., International Court of Justice Press Release 2004/23 (June 25, 2004) available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> [hereinafter Press Release 2004/23] (announcing date and time that ICJ rendered opinion); Press Release 2004/28, *supra* note 16 (announcing that ICJ rendered its opinion and found separation barrier violated international law).

48. See *Report Prepared Pursuant to ES-10/13*, *supra* note 11, at Ann. I, ¶ 6 (stating that Israel believes that separation barrier is consistent with notion of self-defense enshrined in Article 51 of U.N. Charter); see also *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶¶ 138-39 (noting relevance of Article 51 of U.N. Charter).

The ICJ, however, found that these arguments did not apply to the conflict between Israel and the OPT.<sup>49</sup> In striking down the applicability of Article 51 of the U.N. Charter, the ICJ stated that the U.N. Charter only recognizes the right to act in self-defense in response to an armed attack perpetrated by one State against another State.<sup>50</sup> The ICJ concluded that Israel could not use the justification of self-defense because the threats could not be attributed to a State, but rather to terrorist organizations.<sup>51</sup> Furthermore, the ICJ noted that the threat came from within the OPT, an area controlled by Israel, indicating that the attacks were not acts of international terrorism.<sup>52</sup> Therefore, the situa-

---

49. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶¶ 138-39 (stating that Article 51 of U.N. Charter did not apply because attacks were coming from OPT); see also Lubet, *supra* note 19 (noting that ICJ found that right of self-defense did not apply to Israel's right to build separation barrier); *New U.N. Assault*, *supra* note 20 (observing that ICJ found that right to self-defense does not apply to Israeli fight against terror).

50. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶ 139 (stating that Article 51 of U.N. Charter only allows State to act in self-defense in response to armed attack perpetrated by another State); see also *id.* at 1063, ¶ 34 (separate opinion of Higgins J.) (noting that nothing in text of Article 51 of U.N. Charter requires that attack come from another State, rather it is result of ICJ determination in *Military and Paramilitary Activities*, (Nicar. v. U.S.), [1986] I.C.J. 14 ("*Nicaragua Case*")); *id.* at 1072, ¶ 35 (separate opinion of Kooijmans J.) (concluding that Security Council Resolution 1368 and 1373 recognized new right of self-defense and that ICJ bypassed new element of international law, implications of which were yet to be determined, but finding that provisions weren't actually relevant because acts were not international acts but originated from territory controlled by Israel).

51. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶ 139 (stating that Article 51 of U.N. Charter can not be used to justify action because attacks can not be attributed to State). But see *id.* at 1063, ¶ 34 (separate opinion of Higgins, J.) (noting that nothing in text of Article 51 of U.N. Charter requires that attack come from another State, rather it is result of another ICJ determination in *Nicaragua Case*); *id.* at 1072, ¶ 35 (separate opinion Kooijmans, J.) (concluding that Security Council Resolutions 1368 and 1373 were not actually relevant because cross Green-Line attacks were not international acts but originated from territory controlled by Israel); Feinstein, *supra* note 1 at 67-68 (explaining that nothing in U.N. Charter specifies that only State can perpetrate an armed attack and that Article 51 of U.N. Charter is broad enough to permit use of self-defense to counter acts that can not be attributed to State).

52. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶¶ 39 (finding that Article 51 of U.N. Charter was not relevant because threats came from OPT, area controlled by Israel); see also *id.* at 1079, ¶ 6 (declaration of Buerghenthal, J.) (noting that ICJ's conclusion that Green Line is divide between Israel and OPT, as it has done in implicating that portions of separation barrier that cross Green Line illegally take control from OPT, indicated that attacks came from outside area controlled by Israel and right to self-defense should thus be invoked and that ICJ should not have concluded that separation barrier was not justified by self-defense without addressing facts bearing on decision to build separation barrier and that nothing in Charter requires that exercise of right of self-defense is contingent upon act of aggression originating with another

tion was different from the one contemplated in Security Council Resolutions 1368 and 1373, which addressed attacks that originated from territories not controlled by the United States.<sup>53</sup> In the discussion, the ICJ never mentioned the word "terrorism" and did not address the threats coming from the OPT.<sup>54</sup>

In its dispositive, the ICJ recommended that the General Assembly and the Security Council consider the necessary action required to bring an end to the illegal situation.<sup>55</sup> The ICJ then concluded by noting the general context of the situation in

State); *id.* at 1063, ¶ 34 (separate opinion of Higgins, J.) (stating that does not understand ICJ's determination that occupying power loses right to defend its own civilians at home when the attacks emanate from occupied territory when territory is neither annexed nor part of Israel); McCarthy, *supra* note 21 (noting that ICJ found separation barrier to be illegal seizure of property belonging to another country, yet found that territories were not country for the purposes of self defense issue); *New U.N. Assault*, *supra* note 20 (noting that ICJ had elevated OPT to quasi-State status).

53. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶¶ 39 (noting that origin of attacks against Israel and attacks addressed in Security Council Resolutions 1368 and 1373 are different, and thus Resolutions are not relevant in analysis of self-defense argument); see also S.C. Res. 1368, *supra* note 7 (affirming right to act in individual or collective self-defense after September 11th attacks against United States); S.C. Res. 1373, *supra* note 7 (condemning September 11th attacks and reiterating that all acts of international terrorism pose threat to international peace and security).

54. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶¶ 138-40 (finding that Article 51 of U.N. Charter does not apply as Israel suggests because the threat does not come from another State and because it does not come from area outside Israeli control and that ICJ does not have requisite evidence to determine that necessity would justify Israel's actions); see also, *id.* at 1063, ¶ 34 (separate opinion of Higgins, J.) (maintaining reservations regarding ICJ's interpretation of applicability of Article 51 of U.N. Charter); *id.* at 1097, ¶ 27 (separate opinion of Owada, J.) (noting importance of considering separation barrier as part of situation in Middle East with long history); *id.* at 1079, ¶ 5 (declaration of Buerghenthal, J.) (commenting on importance of addressing separation barrier in context of deadly attacks that have occurred against citizens of Israel); *id.* at 1068, ¶ 12 (separate opinion of Koopmans, J.) (stating that ICJ never put protections potentially afforded by separation barrier in context of dispute and that ICJ stated importance of regarding context of dispute as whole); *National Post*, *supra* note 19 (noting that that word "terrorism" never appears in Opinion); *What the Court Advisory Opinion Does and Does Not Say*, *supra* note 19 (observing that ICJ did not address defensive role of barrier); Lubet, *supra* note 19 (noting that treatment of security issue was dismissive and that ICJ never put protections afforded by separation barrier in context of larger, ongoing dispute); Ephron, *supra* note 19 (concluding that even opponents of separation barrier believed issue was not addressed appropriately).

55. See *Construction of a Wall Case*, 43 I.L.M. at 1054-56, ¶ 163 (3)(E) (stating that Security Council and General Assembly should consider what additional actions are necessary to bring end to illegal situation resulting from construction of separation barrier); see also *Summary of Advisory Opinion*, *supra* note 15 (noting that ICJ determined that Security Council and General Assembly should determine additional actions to be taken by United Nations to ensure that illegal situation created by separation barrier ends); *What the Court Advisory Opinion Does and Does Not Say*, *supra* note 19 (observing



Israel.<sup>56</sup> It emphasized the obligation of both Israel and Palestine to observe the rules of international law and the protection of civilian life.<sup>57</sup> Furthermore, it reiterated the need for a negotiated peace, and the creation of a separate Palestinian State.<sup>58</sup> This Advisory Opinion has implications regarding the analysis of the legality of other uses of Article 51 of the U.N. Charter, such as U.S. War on Terror.<sup>59</sup>

## 2. U.S. Operation Enduring Freedom

Al Qaeda had launched a series of attacks against the United States, including attacks against the U.S.S. Cole, the U.S. embassies in Kenya and Tanzania, the first bombing of the

---

that ICJ called on General Assembly and Security Council to consider what further action was necessary to bring end to existence of barrier).

56. See *Construction of a Wall Case*, 43 I.L.M. at 1054, ¶ 162 (noting that ICJ believes that construction must be placed in general context of situation in Middle East since 1947); see also *id.* at 1093-94, ¶¶ 11-12 (separate opinion of Owada, J.) (noting that ICJ should not be expected to consider advisory opinion outside of context of entire conflict). But see *id.* at 1060, ¶¶ 15-16 (separate opinion of Higgins, J.) (noting that ICJ failed to address importance of surrounding circumstances even after recognizing importance of addressing entire conflict); Lubet, *supra* note 19 (noting that ICJ failed to address properly Israel's justification for building separation barrier).

57. See *Construction of a Wall Case*, 43 I.L.M. at 1054, ¶ 162 (stating that both Israel and OPT are under obligation to respect rules of international humanitarian law); see also *id.* at 1098, ¶ 31 (separate opinion of Owada, J.) (observing relevance of mutual resort to indiscriminate acts of violence); *id.* at 1078, ¶ 3 (declaration of Buergenthal, J.) (maintaining importance of addressing cross Green Line attacks and acts of violence on both parties); *id.* at 1087-88, ¶ 3.1 (separate opinion of Elaraby, J.) (noting that both parties have duty to respect human rights law); Noah Leavitt, *Two Recent Decisions on Israel's Security Barrier*, FindLaw Law Center, July 13, 2004, available at <http://cnn-studentnews.cnn.com/2004/LAW/07/13/leavitt.israel.barrier/> (noting that ICJ dismissed Israel's claim of self-defense and ignored fact that Israeli citizens were having their fundamental right to life violated by terrorists who enter Israel).

58. See *Construction of a Wall Case*, 43 I.L.M. at 1054, ¶ 162 (noting need for peace in region and for creation of separation of separate Palestinian State); see also Evelyn Gordon, *Arbitration Requires Consent*, JERUSALEM POST, July 13, 2004, available at 2004 WL 61260718 (observing that ICJ judges did not attempt to keep politics out of Opinion and stated its view of appropriate outcome of Israeli-Palestinian conflict, that two separate states should be created); *National Post*, *supra* note 19 (concluding that Opinion was political manifesto that ignored Israel's arguments and never mentioned terrorism, and that ICJ ruled on matter that did not have jurisdiction over because ICJ wanted to comment on matter); *What the Court Advisory Opinion Does and Does Not Say*, *supra* note 19 (criticizing opinion in *Construction of a Wall Case* for failing to enforce Israel's right to self-protection).

59. See Lubet, *supra* note 19 (noting that holding of *Construction of a Wall Case* indicates that United States is not justified in acting against al Qaeda); see also *New U.N. Assault*, *supra* note 20 (stating that opinion in *Construction of a Wall Case* had potential to challenge justifications used by United States in entering war on terror).

World Trade Center, and other attacks against U.S. nationals abroad.<sup>60</sup> One of the stated objectives of al Qaeda is to kill Americans and their allies, regardless of whether they are part of the U.S. military.<sup>61</sup> Shortly following the September 11th attacks, U.S. President George W. Bush announced that the government would wage a "War on Terror" and would begin with strikes against al Qaeda and the Taliban.<sup>62</sup> Operation Enduring Freedom began in Afghanistan on October 7th, 2001.<sup>63</sup> Strikes were directed at camps allegedly belonging to al Qaeda and other Taliban military targets.<sup>64</sup> During the military operation, the United States also provided food to the citizens of Afghanistan and attempted to respect the Islamic culture.<sup>65</sup>

---

60. See *In re Terrorist Attacks on September 11th, 2001*, 349 F. Supp. 2d 765, 785 n.16 (S.D.N.Y. 2005) (stating that al Qaeda has been tied to 1993 attack on World Trade Center and embassy bombings that occurred in 1998); see also King, *supra* note 1, at 462 (explaining that September 11th attacks were not isolated incident, but were part of series of attacks by al Qaeda against United States); Paust, *supra* note 12, at 533 (listing attacks against U.S.S. Cole, U.S. embassies in Kenya and Tanzania, and World Trade Center as some in series of terrorist attacks perpetrated by al Qaeda against United States); Saura, *supra* note 2, at 14 (noting that Taliban Government and al Qaeda were accused of orchestrating bombings of U.S. embassies in Kenya and Tanzania).

61. See Osama bin Laden et al., *Jihad Against Jews and Crusaders: World Islamic Front Statement*, available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited Mar. 16, 2005) (proclaiming that it is duty of Muslims to kill Americans and their allies regardless of whether individuals are affiliated with the military); see also Kastenberger, *supra* note 2, at 103 (noting that al Qaeda has made statements declaring that its mission includes killing all Americans, even if they are civilians); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 587-88 (2004) (observing that September 11th attacks were part of ongoing campaign perpetrated by al Qaeda terrorist organization that has proclaimed that it will continue its campaign of terror until America surrenders or is destroyed).

62. See George W. Bush, Presidential Address to a Joint Session of Congress (Sept. 20, 2001), available at <http://www.globalsecurity.org/military/library/news/2001/09/mil-010920-usia01.htm> (outlining presidential plan to begin War on Terror); see also Sadat, *supra* note 2, at 136-37 (explaining that on September 20, 2001, U.S. President Bush presented plan to Congress to initiate war on terror).

63. See Sadat, *supra* note 2, at 137 (stating that Operation Enduring Freedom began on October 7, 2001); see also Saura, *supra* note 2, at 24 (noting that Operation Enduring Freedom was launched on October 7, 2001, almost one month after September 11th attacks); George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 509 (2003) (describing early days of Operation Enduring Freedom and explaining that as of October 7, 2001, military operations in Afghanistan dominated War on Terror).

64. See Walker, *supra* note 63, at 509 (clarifying that military operation was directed towards Taliban military targets and camps of al Qaeda members); see also Schmitt, *Assessment*, *supra* note 1, at 738 (observing that Operation Enduring Freedom was launched against al Qaeda and Taliban targets in Afghanistan).

65. See Walker, *supra* note 63, at 512 (explaining that during Operation Enduring

The United States initiated military action against al Qaeda and the Taliban as an exercise of its right of self-defense under Article 51 of the U.N. Charter.<sup>66</sup> The United States took action to deter and prevent future attacks on the United States by the al Qaeda terrorist network.<sup>67</sup> Immediately following the start of Operation Enduring Freedom, Osama bin Laden, the individual believed to have organized all of the attacks against the United States, released a pre-recorded tape in which he praised all Muslims who attacked Americans.<sup>68</sup>

Al Qaeda is a non-State affiliated, Islam-based group that claims to speak on behalf of *umma*, the global community of Muslims, and is determined to fight all enemies on behalf of the organization.<sup>69</sup> The group was organized in 1989 to coordinate

---

Freedom, food supply was critical but that United States allocated resources to help provide for the need); see also King, *supra* note 1, at 469-71 (observing that U.S. officials argue that military operations have been strategic and have aimed to minimize civilian casualty).

66. See Giblert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L. Q. 537, 545-46 (2004) (explaining that military actions against al Qaeda and Taliban were undertaken under Article 51 of U.N. Charter and that United States did not seek authorization for military action from Security Council); see also Saura, *supra* note 2, at 22 (clarifying that Operation Enduring Freedom was justified by principle of self-defense and was neither authorized nor supported by Security Council Resolutions adopted immediately following the September 11th attacks); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 44 (2003) (stating that Security Council did not authorize United States to use force in Afghanistan) [hereinafter Murphy, *Terrorism and the Concept of Armed Attack*].

67. See Sadat, *supra* note 2, at 139 (stating that as part of Operation Enduring Freedom, United States has taken action to help deter and prevent attacks by taking measures against terrorist training camps and military installations); see also Beard, *supra* note 61, at 578 (concluding that link between Taliban, al Qaeda, and September 11th attacks is well established).

68. See Bin Laden's Warning: Full Text, Oct. 7, 2003, available at [http://news.bbc.co.uk/1/low/world/south\\_asia/1585636.stm](http://news.bbc.co.uk/1/low/world/south_asia/1585636.stm) (giving full text of warning issued by Osama Bin Laden on October 7, 2001 warning that United States and those who live in United States will no longer live in peace); see also Walker, *supra* note 63, at 510-11 (explaining that on day that Operation Enduring Freedom Began, Osama bin Laden released tape on which he praised Muslims for their attacks against American and called on all Muslims to make religious victories).

69. See Philpott, *supra* note 2, at 988 (observing that al Qaeda is non-State actor that claims to speak on behalf of globalized community of Muslims, also known as *umma*); see also Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 651, n. 12 (2002) (explaining that al Qaeda is umbrella organization that coordinates activities for the global Muslim community against enemies of Islam); Joseph E. Ritch, *They'll Make You an Offer You Can't Refuse: A Comparative Analysis of International Organized Crime*, 9 TULSA J. COMP. & INT'L L. 569, 573-74 (2002) (noting that al Qaeda is multi-national support group that funds and organizes activities on behalf of Islamic movement).

plans and recruit individuals for a *jihad*, or religious war, against Soviets in Afghanistan.<sup>70</sup> Osama bin Laden is considered the leader of this organization.<sup>71</sup> Like Hamas, al Qaeda's governing philosophy incorporates the Koran.<sup>72</sup> In 1996, Osama bin Laden issued a *fatwa*,<sup>73</sup> known as the Ladenese Epistle that urged all Muslims to take arms against the United States in a *jihad*.<sup>74</sup> Additionally, in 1998 bin Laden issued another *fatwa* urging Muslims to kill Americans and Jews.<sup>75</sup>

The international community supported Operation Endur-

70. See Torruella, *supra* note 69, at 651, n.12 (observing that al Qaeda was originally formed to organize individuals for coordinated attacks against Soviets in Afghanistan); see also Ritch, *supra* note 69, at 573-74 (explaining that al Qaeda is multi-national group that funds and organizes acts of terror, and was formed in response to Afghan-Soviet War).

71. See Torruella, *supra* note 69, at 651, n.12 (noting that most consider Osama bin Laden to be in control of al Qaeda); see also Ritch, *supra* note 69, at 573-74 (explaining that al Qaeda was formed by Osama Bin Laden); Maxwell O. Chibundu, *For God, For Country, For Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883, 892-93 (2004) (observing that Osama bin Laden is leader of al Qaeda and has been credited with masterminding attacks against United States).

72. See Kastenber, *supra* note 2, at 105 (noting that al Qaeda's underlying philosophy includes a literal reading of the Koran); see also Philpott, *supra* note 2, at 987 (stating that September 11th attacks were carried out by Islamic revivalists who have commenced *jihad*, or religious war, against United States); Torruella, *supra* note 69, n.12 (observing that Osama bin Laden, alleged leader of al Qaeda, has issued at least two *Fatwahs*, or documents issued by religious leaders and scholars to give guidance to followers of Islam, which are binding upon them); Cohan, *Formulation*, *supra* note 30, at 98 (stating that Osama bin Laden called on Muslims to begin Holy War, or *jihad*, against "Americans and Jews").

73. See Torruella, *supra* note 69, at 651, n.12 (defining *fatwa* as decree issued to followers of Islam to give guidance and binds them to actions called for in decree); see also Oren Asman, *Abortion in Islamic Countries – Legal and Religious Aspects*, 23 MED. & L. 73, 77 (2004) (describing *fatwa* as explanation or clarification of issue by person who is learned in Islamic Law).

74. See Ladenese Epistle: Declaration of War: Part I, available at <http://www.washingtonpost.com/ac2/wp-dyn/A4342-2001Sep21> (excerpting Ladenese Epistle) (last visited March 12, 2005); see also Torruella, *supra* note 69, at 651, n.12 (explaining that Osama bin Laden issued decree called *fatwa*, calling on all Muslims to take arms against Americans); Cohan, *Formulation*, *supra* note 30, at 98 (noting that Osama bin Laden issued *fatwa* calling for Muslims to embark on religious war or *jihad* against the United States); Philpott, *supra* note 2, at 987 (explaining that members of al Qaeda are Islamic revivalists who have launched religious war against defilers of Islam, including United States).

75. See Torruella, *supra* note 69, n.12 (noting that Osama bin Laden issued another *fatwa* on February 22, 1998, stating that members should kill Americans and Jews); see also Osama bin Laden, *Al-Qaeda, and the Jihad (Holy War)*, available at <http://www.september11news.com/OsamaBinLaden.htm> (last visited Mar. 12, 2005) (excerpting portion of 1998 *Fatwa*).

ing Freedom.<sup>76</sup> It did not condemn the use of force in response to the September 11th attacks.<sup>77</sup> That support, combined with the language of Security Council Resolutions 1368 and 1373, indicates that the international community accepts that a terrorist act of the magnitude of the September 11th attacks constitutes an armed attack, thus enabling a State to legally use force under Article 51.<sup>78</sup> While Article 38 of the Statute of the ICJ recognizes this acceptance as evidence of international customary law, the ICJ has not yet held that such grave acts would constitute an armed attack.<sup>79</sup>

---

76. See Stahn, *supra* note 1, at 35 (observing international community supported Operation Enduring Freedom); see also Schmitt, *Assessment*, *supra* note 1, at 748 (arguing that international acceptance of response to September 11th attacks indicates that international community approves use of force in response to transnational terrorism); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 536-39 (2003) (observing that North Atlantic Treaty Organization ("NATO") and Organization of American States ("OAS") and Australia, Canada, Czech Republic, Georgia, Italy, Japan, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, South Korea, Tajikistan, Turkey, Uzbekistan, and United Kingdom all provided support to Operation Enduring Freedom, indicating that States apply law of self-defense to acts perpetrated by non-State actors) [hereinafter Schmitt, *Preemptive Strategies*].

77. See Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 47 (noting that while past terrorist activities may not have constituted armed attack, scale of September 11th attacks were grave enough to meet level of armed attack and that international community accepted this interpretation, which was demonstrated through support given to Operation Enduring Freedom); see also Stahn, *supra* note 1, at 36 (observing that September 11th attacks reached magnitude that no other terrorist strike had reached); King, *supra* note 1, at 471 (concluding that threat of attacks such as those that occurred on September 11th has changed way that international law is used and interpreted because demonstrated enormity of terrorist capabilities); Beard, *supra* note 61, at 574-75 (commenting that because attacks caused extensive loss of life and severe damage to property, strikes were category of armed attack).

78. See Judgment of Nov. 6, 2003, *Oil Platforms Case* (Iran v. U.S.), ¶ 51, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_jjudgment\\_20031106](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_jjudgment_20031106). PDF (noting that for series of attacks to constitute armed attack, it would have to be considered grave use of force); see also *Nicaragua Case*, [1986] I.C.J. 14, 101, ¶ 191 (concluding that in determining whether action constituted armed attack, must distinguish between uses of force and most grave uses of force); Schmitt, *Assessment*, *supra* note 1, at 761-63 (arguing that acceptance of Operation Enduring Freedom by international community demonstrates their appreciation of emergence of new international terrorism and that American strategy is consistent with this shift, and concluding that in 21st Century the international community has come to accept use of force against non-State actors so long as all requirements of self-defense have been met); Feinstein, *supra* note 1, at 55 (commenting that international community recognizes that new reality of nature of terrorist organizations requires new thinking in order for States to protect citizens).

79. See Statute of the I.C.J., art. 38 (recognizing that international custom is evidence of accepted law); see also *Oil Platforms Case*, ¶ 51, available at <http://www.icj-cij>.

### B. Statutory Standards for Review by the International Court of Justice ("ICJ")

In order for the ICJ to have jurisdiction to hear a case two requirements must be met.<sup>80</sup> First, the request for the advisory opinion must be properly made, giving the ICJ jurisdiction to answer the question presented to it.<sup>81</sup> Second, the ICJ must determine whether there are any reasons why it should decline to give a response to the question presented.<sup>82</sup>

The Statute of the ICJ allows the ICJ to answer a request from any body authorized by the U.N. Charter.<sup>83</sup> The U.N. Charter authorizes the General Assembly to file a request for an opinion.<sup>84</sup> In order for a question, and thus a request for an

---

org/icjwww/idoocket/iop/iopjudgment/iop\_ijudgment\_20031106.PDF (noting that series of attacks will only be considered armed attack if it is grave use of force); Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 47-48 (observing that international community accepted that September 11th attacks were grave use of force which was demonstrated through support given to Operation Enduring Freedom); King, *supra* note 1, at 471 (finding that threat of additional attacks of magnitude of September 11th attacks has changed way that international law is used and interpreted because demonstrated enormity of terrorist capabilities).

80. See *Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. 226, 232, ¶ 10 (stating that ICJ must determine both whether it has jurisdiction to hear case and whether it should choose to exercise that jurisdiction) [hereinafter *Nuclear Weapons Case*]; see also *Construction of a Wall Case*, 43 I.L.M. 1009, 1024, ¶ 44 (July 9, 2004) (noting that ICJ has discretionary power to decline to give Advisory Opinion); *Summary of Advisory Opinion*, *supra* note 15 (noting that there are instances ICJ should decline to exercise jurisdiction).

81. See Statute of the I.C.J., art. 65, ¶ 1 (defining competence of ICJ); see also *Construction of a Wall Case*, 43 I.L.M. at 1016, ¶¶ 13, 14 (stating that precondition of ICJ's competence is that request must come from body duly authorized by Charter, and that question must arise within scope of that body's duties); *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, [1982] I.C.J. 325, 333-34, ¶ 21 (noting that request must come from duly authorized body and question must arise out of body's duties).

82. See *Nuclear Weapons Case*, [1996] I.C.J. at 232, ¶ 10 (stating that ICJ must determine both whether it has jurisdiction to hear case and whether it should choose to exercise that jurisdiction); see also *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 44 (observing that jurisdiction is two part inquiry, whether there is statutory jurisdiction and whether there is any reason to decline to exercise jurisdiction); *Summary of Advisory Opinion*, *supra* note 15 (noting that there are instances ICJ should decline to exercise jurisdiction).

83. See Statute of the I.C.J., art. 65 (stating that ICJ can give advisory opinion in response to question asked by authorized body); see also *Nuclear Weapons Case*, [1996] I.C.J. at 232, ¶ 10 (explaining that ICJ gets authorization to give advisory opinions from Article 65 of Statute of ICJ); *Construction of a Wall Case*, 43 I.L.M. at 1017, ¶ 15 (noting that General Assembly may request advisory opinion).

84. See U.N. CHARTER, art. 96 (stating that General Assembly or Security Council can request an advisory opinion); see also *Construction of a Wall Case*, 43 I.L.M. at 1017, ¶

opinion, to be valid, however, it must fall within the scope of the duties of the General Assembly.<sup>85</sup> Article 11 of the U.N. Charter charges the General Assembly with the duty to hear all cases associated with maintaining international peace and security brought to it by both Member States and non-Members.<sup>86</sup> The General Assembly can also make recommendations for peaceful changes to any situation that it determines will likely impact the friendly relations and general welfare among Nations.<sup>87</sup> Article 12 of the U.N. Charter limits the ability to issue recommendations by providing that the General Assembly cannot issue recommendations on issues before the Security Council.<sup>88</sup>

Despite this potential limitation, General Assembly Resolution 377(V), Uniting for Peace, has been interpreted to allow the Security Council and the General Assembly to deal simultaneously with matters when the issue focuses on the maintenance of international peace and one permanent Member prevents the Security Council from issuing resolutions.<sup>89</sup> When this occurs,

---

15 (noting that General Assembly is authorized to make a request); *Nuclear Weapons Case* [1996] I.C.J., at 232, ¶ 11 (explaining that General Assembly is body authorized to make such request).

85. See Comments on White Paper, *supra* note 21 (noting that while General Assembly is authorized, there are many claims that General Assembly acted outside of its powers); *Nuclear Weapons Case*, [1996] I.C.J. at 232, ¶¶ 11-12 (explaining that Security Council and General Assembly are not permitted to ask questions unrelated to their work); *Construction of a Wall Case*, 43 I.L.M. at 1017, ¶¶ 15-17 (noting that ICJ has looked at relationship between General Assembly and nature of question to determine if question falls within its duties).

86. See U.N. CHARTER art. 11, ¶ 2 (allowing General Assembly to hear all issues regarding maintenance of international peace); see also *Construction of a Wall Case*, 43 I.L.M. at 1017, ¶ 17 (describing competence of General Assembly to make requests).

87. See U.N. CHARTER art. 11, ¶ 1 (enabling General Assembly to make recommendations regarding issues brought before it); see also *Construction of a Wall Case*, 43 I.L.M. at 1017, ¶ 17 (explaining ability of General Assembly to make requests).

88. See U.N. CHARTER art. 12, ¶ 1 (stating that General Assembly shall not make recommendations regarding issues that are before Security Council); see also *Construction of a Wall Case*, 43 I.L.M. at 1019, ¶¶ 24, 25 (recognizing limitation placed on authority of General Assembly to make recommendations and that Israel raised this issue, alleging that General Assembly, by requesting advisory opinion, had acted *ultra vires* under U.N. Charter).

89. See *Construction of a Wall Case*, 43 I.L.M. at 1019, ¶ 27 (noting trend to allow General Assembly and Security Council to hear matters at same time); see also Uniting for Peace, G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, ¶ 1, U.N. Doc. A/1775 (1950) (allowing General Assembly to make recommendations if Security Council is unable to act in matters regarding security due to lack of unanimity of permanent members); Comments on White Paper, *supra* note 21 (noting that General Assembly's Uniting for Peace Resolution declared ability of General Assembly to act in instances

the General Assembly addresses the economic, humanitarian, and social aspects in its recommendations.<sup>90</sup>

In deciding if the ICJ has jurisdiction to hear a case, the ICJ must undertake a further inquiry after the procedural requirements.<sup>91</sup> Article 65 of the Statute of the ICJ says that the ICJ *may* issue an advisory opinion.<sup>92</sup> The Judges have interpreted this to mean that after determining that the request for an advisory opinion was proper, they must inquire whether there are any reasons why they should decline to hear the case.<sup>93</sup> In the *Construction of a Wall Case*, the ICJ augmented its previous decisions determining when it would be appropriate to decline to exercise jurisdiction.<sup>94</sup>

---

where, because of lack of unanimity of permanent members, Security Council fails to maintain international peace and security).

90. See *Construction of a Wall Case*, 43 I.L.M. at 1019, ¶ 27 (noting that General Assembly focuses on humanitarian, social and economic impact of conflict and citing other examples of such situations, including those involving Angola, Bosnia and Herzegovina, Cyprus, Somalia, South Africa, and Southern Rhodesia); see also Comments on White Paper, *supra* note 21 (observing that the Uniting For Peace Resolution was used in Suez Crisis of 1956 and Congo Crisis of 1963).

91. See *Nuclear Weapons Case*, [1996] I.C.J. at 232, ¶ 10 (stating that ICJ must determine both whether it has jurisdiction to hear case and whether it should choose to exercise that jurisdiction); see also *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 44 (explaining ICJ must address both whether it has jurisdiction to hear case and whether there it should hear case); *Summary of Advisory Opinion*, *supra* note 15 (noting that there are instances where ICJ should decline to exercise jurisdiction).

92. See Statute of the I.C.J., art. 65, ¶ 1 (stating that ICJ may issue advisory opinion on any legal question asked of it by authorized body of United Nations); *Nuclear Weapons Case*, [1996] I.C.J. at 232, ¶ 10 (noting that ICJ draws its competence from Article 65 of Statute of ICJ which states that ICJ may give advisory opinion, indicating that there is two step inquiry, whether ICJ has jurisdiction and whether to exercise jurisdiction would be within judicial character of ICJ).

93. See *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 44 (stating that although ICJ may hear case it does not have to if there are reasons for it to decline jurisdiction); see also *Nuclear Weapons Case*, [1996] I.C.J. at 234-35, ¶ 14 (noting that Statute of ICJ leaves it to ICJ to determine if it should hear case after it determines its competence).

94. See Gordon, *supra* note 57 (concluding that that ICJ disregarded consent requirement, one of cardinal protections guaranteed in ICJ Charter); see also *Decision Dismisses Israel's Arguments*, *supra* note 12 (finding that ICJ's Opinion may provide precedent for ICJ to bring sovereign States before ICJ and force State to defend policy before ICJ); *Draft Resolution Demands Israel's Compliance to be Considered Monday, 19 July*, United Nations Press Release GA/10246 (Jul. 16, 2004) [hereinafter press Release GA/10246] (stating that several States believe decision to hear case improperly evaded consent requirement and inappropriately politicized ICJ).



## II. RECENT INTERNATIONAL COURT OF JUSTICE ("ICJ") DECISIONS AFFECTING THE WAR ON TERROR

The ICJ has rendered an opinion on the construction of a separation barrier by Israel to protect against the cross Green-Line strikes.<sup>95</sup> In the *Construction of a Wall Case*, the ICJ altered its previous determinations of when it is appropriate to exercise jurisdiction.<sup>96</sup> Further, the ICJ set a dangerous precedent that may have implications for the United States and the rest of the international community in its fight against international terrorism.<sup>97</sup>

### A. A New Interpretation of Jurisdiction

The request in the *Construction of a Wall Case* conformed with the procedural requirements of both the U.N. Charter and the ICJ Statute.<sup>98</sup> After determining that the ICJ had jurisdiction to issue an advisory opinion, the ICJ had the duty to determine whether any reason existed to decline to exercise its jurisdic-

---

95. See *Construction of a Wall Case*, 43 I.L.M. 1009, 1054-56, ¶ 163 (stating that ICJ issued advisory opinion for *Construction of a Wall Case* on July 9, 2004); see also Press Release 2004/28, *supra* note 16 (announcing that ICJ issued advisory opinion on *Construction of Wall*).

96. See *Construction of a Wall Case*, 43 I.L.M. at 1060, ¶¶ 12-13 (separate opinion of Higgins, J.) (noting that ICJ found that this dispute was not bilateral because ICJ had issued opinions on matter); see also Gordon, *supra* note 58 (noting that in future General Assembly will be able to bring any matter before ICJ by issuing resolutions and becoming involved in matter); *Construction of a Wall Case*, 43 I.L.M. at 1095-96, ¶ 20 (separate opinion of Owada, J.) (stating that lack of consent does not deprive ICJ of jurisdiction, but ICJ must remain fair in administration of justice, which becomes more difficult when one party is not required to present ICJ with relevant information, and noting that while there was abundance of information provided to ICJ, it was very one-sided); *id.* at 1078, ¶ 1 (declaration of Buergenthal, J.) (concluding that while ICJ stated that it had relevant information, fact that it later stated that it did not believe, based on facts, that separation barrier provided desired security objectives indicates that there was not enough information).

97. See Lubet, *supra* note 2 (noting that logic of ICJ in *Construction of a Wall Case* would indicate that United States would not be justified in acting against al Qaeda, but that action was permitted by Security Council in Resolutions 1368 and 1373); see also New U.N. Assault, *supra* note 20 (observing that dispositive in *Construction of a Wall Case* had potential to challenge justifications used by United States in entering war on terror).

98. See U.N. CHARTER art. 35, ¶ 1 (stating that General Assembly and Security Council may request advisory opinion); see also Statute of the I.C.J., arts. 65-68 (announcing procedural requirements of advisory opinions); *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 28 (stating that ICJ found that it had jurisdiction to hear case); Press Release 2004/28, *supra* note 95 (asserting that ICJ voted unanimously that it had jurisdiction to hear case).

tion.<sup>99</sup> Member States, commentators, and even ICJ Judges raised many issues regarding the ICJ's jurisdiction and decision to give an advisory opinion.<sup>100</sup> Three of the principle arguments against the exercise of jurisdiction that the ICJ had previously determined would make it inappropriate to give an opinion included: (1) where the request circumvents the principle that States must consent to involvement in a dispute brought before the ICJ;<sup>101</sup> (2) when the case involves a bi-lateral dispute;<sup>102</sup> and (3) where the ICJ does not have all of the information necessary

---

99. See *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 44 (stating that although ICJ may hear case it does not have to if there are reasons for it to decline jurisdiction); see also *Nuclear Weapons Case*, [1996] I.C.J. 226, 232, ¶ 14 (noting that Statute of ICJ leaves it to ICJ to determine if it should hear case after it determines its competence).

100. See Douglass Cassell, *World View Comment. No. 188; The World Court and Israel's Wall*, Feb. 25, 2004 available at [http://www.law.northwestern.edu/depts/clinic/ihr/display\\_details.cfm?ID=383&document\\_type=commentary](http://www.law.northwestern.edu/depts/clinic/ihr/display_details.cfm?ID=383&document_type=commentary) (observing that opponents argue that Advisory Opinion in *Construction of a Wall Case* would intrude on privileges of Security Council, require fact-finding, politicize ICJ, violate Israel's sovereignty by deciding case without its consent, and threaten peace process); see also *Construction of a Wall Case*, 43 I.L.M. at 1025-29, ¶¶ 46-63 (stating that some arguments against ICJ exercising jurisdiction that were addressed in Opinion include: wisdom of issuing opinion regarding contentious matter between Israel and Palestine, impact on negotiated peace, role of separation barrier as part of larger conflict, availability of requisite facts, purpose of opinion, and fault of Palestine with regard to conflict); *Comments on White Paper*, *supra* note 21 (examining various reasons why ICJ jurisdiction may be improper).

101. See Rozenberg, *supra* note 18 (noting that ICJ has declined to exercise jurisdiction when parties do not consent); see also *Western Sahara Advisory Opinion*, [1975] I.C.J. 12, 25, ¶¶ 33 (concluding that when one party does not consent to dispute, providing advisory opinion may not be within judicial character of ICJ) [hereinafter *Western Sahara Case*]; *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 46 (stating that Israel did not consent to proceedings before ICJ); *Comments on White Paper*, *supra* note 21 (re-marking that advisory opinion should not be used to avoid principle of consent-based jurisdiction); *Construction of a Wall Case*, 43 I.L.M. at 1059, ¶ 9 (commenting that issue of consent of parties is still relevant in deciding to exercise discretion); *Summary of Advisory Opinion*, *supra* note 15 (noting that many contend that ICJ should decline jurisdiction because Israel has not consented to matter); Leavitt, *supra* note 57 (reiterating that Israel did not consent to jurisdiction); McCarthy, *supra* note 21 (observing that cornerstone of legal exchange as means of conflict resolution is consent); Gordon, *supra* note 58 (concluding that ruling eliminates notion that arbitration requires consent and requirement of consent was one of principle protections guaranteed in ICJ Charter).

102. See *Construction of a Wall Case*, 43 I.L.M. at 1026, ¶ 49 (noting that while many contend this dispute is bilateral in nature, United Nations has become involved and request is to help General Assembly exercise its proper function as defined in several resolutions regarding matter, and thus dispute is not simply bilateral in nature and can be heard by ICJ); see also *id.* at 1060, ¶¶ 6-7 (separate opinion of Higgins, J.) (commenting that ICJ recognized that dispute was between two international actors); *id.* at 1091, 1093, ¶¶ 2, 10 (separate opinion of Owada, J.) (remarking that ICJ should have more closely addressed nature of dispute in its determination not to exercise discretion).

to issue an advisory opinion.<sup>103</sup> All three were present in the *Construction of a Wall Case*, yet the ICJ decided to issue its opinion, thus altering jurisdictional analysis.<sup>104</sup>

Israel did not consent to the jurisdiction of the ICJ regarding the matter.<sup>105</sup> The Statute of the ICJ only requires that parties give consent in contentious matters, but states that the principle may be relevant in advisory proceedings.<sup>106</sup> The ICJ has never declined to give an advisory opinion due to lack of consent;<sup>107</sup> however, its predecessor, the Permanent Court of Inter-

---

103. See *Western Sahara Case*, [1975] I.C.J. at 28-29 ¶ 46 (stating that ICJ must have all necessary information in order to issue advisory opinion and must remain faithful to requirements of judicial character by remaining fair to both parties); see also *Construction of a Wall Case*, 43 I.L.M. at 1078, 1080-81, ¶¶ 1, 7, 10 (declaration of Buergenthal, J.) (reiterating belief that ICJ should have declined to give advisory opinion in *Construction of a Wall Case* because relevant information was not available to ICJ and that Israel was not under obligation to provide relevant information because it did not consent to jurisdiction, and that ICJ never addressed facts relating to Israel's position); *id.* at 1091, 1096, ¶¶ 21, 22 (separate opinion of Owada, J.) (finding that ICJ did not have requisite facts regarding Israel's position and that while Israel is not required to provide facts, ICJ is permitted to seek supplemental information to that provided by parties); Rozenberg, *supra* note 18 (noting that ICJ has declined to issue advisory opinions where it did not have all relevant information).

104. See *Construction of a Wall Case*, 43 I.L.M. at 1060, ¶¶ 12, 13 (separate opinion of Higgins, J.) (stating that ICJ found that this dispute was not bilateral because ICJ had issued opinions on matter); see also Gordon, *supra* note 57 (concluding that in future General Assembly will be able to bring any matter before ICJ by issuing resolutions and becoming involved in matter); *Construction of a Wall Case*, 43 I.L.M. at 1091, 1095-96, ¶ 20 (separate opinion of Owada, J.) (observing that lack of consent does not deprive ICJ of jurisdiction, but ICJ must remain fair in administration of justice which becomes more difficult when one party is not required to present ICJ with relevant information, and noting that while there was abundance of information provided to ICJ, it was very one sided); *id.* at 1078, ¶¶ 1, 3, 4 (declaration of Buergenthal, J.) (concluding that while ICJ stated that it had relevant information, fact that it later stated that it did not believe, based on facts, that separation barrier provided desired security objectives indicates that there was not enough information).

105. See *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 46 (stating that Israel did not consent to proceedings before ICJ); see also *Summary of Advisory Opinion*, *supra* note 15 (reporting that many contend that ICJ should decline jurisdiction because Israel has not consented to matter); Leavitt, *supra* note 57 (reiterating that Israel did not consent to jurisdiction).

106. See Statute of the I.C.J., arts. 26, 68 (requiring that parties consent in contentious matters and that ICJ consider principles of propriety for contentious matters when giving advisory opinion); see also *Western Sahara Case*, [1975] I.C.J. at 20, ¶ 21 (stating that lack of consent does not deprive ICJ of jurisdiction, but rather is consideration in determining propriety of giving advisory opinion); *Construction of a Wall Case*, 43 I.L.M. at 1059, ¶ 10 (separate opinion of Higgins, J.) (explaining that in *Western Sahara Case*, ICJ affirmed principle that consent is not requirement for jurisdiction, but is relevant in determining judicial propriety of giving advisory opinion).

107. See *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 44 (stating that while Israel

national Justice ("PCIJ") declined to give an advisory opinion in the *Status of Eastern Carelia Case* ("*Eastern Carelia Case*") because one party did not consent.<sup>108</sup> The ICJ addressed the relevance of this principle to jurisdiction of the ICJ in the *Western Sahara Advisory Opinion* ("*Western Sahara Case*").<sup>109</sup> In the *Western Sahara Case*, Spain contested the jurisdiction of the ICJ in an advisory proceeding because it did not consent to the matter.<sup>110</sup> Spain relied on the decision in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* ("*Peace Treaties Case*") and on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ("*South West Africa Case*") both of which addressed the relevance of the PCIJ holding in ICJ proceedings.<sup>111</sup> In determining that it did have jurisdiction in

---

contends that ICJ should decline to give advisory opinion in *Construction of a Wall Case* due to lack of consent, ICJ has never declined to give advisory opinion due to lack of consent); see also *Nuclear Weapons Case*, [1996] I.C.J. 226, 235, ¶ 14 (noting that ICJ had not refused to act upon request for advisory opinion).

108. See Advisory Opinion, *Status of Eastern Carelia*, [1923] P.C.I.J. ser. B, No. 5 [hereinafter *Eastern Carelia Case*] (declining to give advisory opinion on matter between Finland and Russia because party that was not member of League of Nations did not consent to jurisdiction); *Construction of a Wall Case*, 43 I.L.M. at 1024, ¶ 44 (explaining that ICJ has never declined jurisdiction due to lack of consent of one party while its predecessor, Permanent Court of International Justice ("PCIJ") only did so once); *Nuclear Weapons Case*, [1996] I.C.J. at 235, ¶ 14 (clarifying that only PCIJ had ever declined to give advisory opinion).

109. See *Western Sahara Case*, [1975] I.C.J. at 21-27, ¶¶ 24-42 (explaining that while Spain contested jurisdiction of ICJ because it did not consent to proceedings, issuance of advisory opinion did not violate principles of judicial propriety); see also *Construction of a Wall Case*, 43 I.L.M. at 1024-29, ¶¶ 42-65 (applying principles of judicial propriety explained in *Western Sahara Case* to *Construction of a Wall Case*); *id.* at 1059, ¶¶ 9-10 (separate opinion of Higgins, J.) (reiterating discussion of judicial propriety in *Western Sahara Case*); *id.* at 1093-94, ¶¶ 12-13 (separate opinion of Owada, J.) (discussing relevance of jurisdictional principles elucidated in *Western Sahara Case*).

110. See *Western Sahara Case*, [1975] I.C.J. at 22, ¶ 25 (observing that Spain contested jurisdiction of ICJ because it did not consent to proceedings); see also Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31, 46 (1998) (noting absence of consent of Spain in *Western Sahara Case* did not preclude ICJ from issuing advisory opinion).

111. See *Western Sahara Case*, [1975] I.C.J. at 23, ¶ 28 (stating that Spain relied on precedent of *Status of Eastern Carelia Case*, and *Peace Treaties Case* in arguing that ICJ did not have jurisdiction to give advisory opinion because Spain did not consent to proceedings); see also *Construction of a Wall Case*, 43 I.L.M. at 1059, ¶ 10 (separate opinion of Higgins, J.) (explaining that while Spain relied on precedent of *Peace Treaties Case* and *Eastern Carelia Case*, ICJ found that cases merely meant that lack of consent may make issuance of advisory opinion incompatible with judicial character but does not prevent ICJ from giving advisory opinion); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, [1950] I.C.J. 65 (answering questions regarding implementation of peace treaties between Hungary, Bulgaria, and Romania); Legal

the *Western Sahara Case*, the ICJ first reiterated the principle that consent is not a requirement in advisory proceedings, such as the *Construction of a Wall Case*, but only in contentious proceedings.<sup>112</sup> Additionally, it noted that the decision of the PCIJ was premised on the fact that the party that did not consent to jurisdiction was neither a member of the League of Nations, nor a party to the Statute of the PCIJ.<sup>113</sup> On the basis of these distinctions, the ICJ found that it did have jurisdiction in the *Western Sahara Case*.<sup>114</sup>

The ICJ did note that lack of consent, if it would render an advisory opinion incompatible with the judicial character of the ICJ, was reason enough to decline to give an advisory opinion.<sup>115</sup> One example of this would be if the purpose of the request has the effect of bypassing the principle that a State is not obligated to have its disputes settled without its consent.<sup>116</sup> In the *Western*

---

Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), [1971] I.C.J. 16 (advising Security Council in responsibilities regarding decolonization of South West Africa) [hereinafter *South West Africa Case*].

112. See *Western Sahara Case*, [1975] I.C.J. at 20, ¶ 21 (stating that lack of consent does not deprive ICJ of jurisdiction, but rather is consideration in determining propriety of giving advisory opinion); see also Sienho Yee, *Forum Prorogatum and the Advisory Proceedings of the International Court*, 95 AM. J. INT'L L. 381, 382-83 (2001) (reiterating principle that advisory jurisdiction comes from U.N. Charter Article 96 and Statute of I.C.J. Article 65, not from consent of States); *Construction of a Wall Case*, 43 I.L.M. at 1059, ¶ 10 (separate opinion of Higgins, J.) (explaining that in *Western Sahara Case*, ICJ affirmed principle that consent is not requirement for jurisdiction, but is relevant in determining judicial propriety of giving advisory opinion).

113. See *Western Sahara Case*, [1975] I.C.J. at 23-24, ¶ 30 (explaining that in *Eastern Carelia Case*, PCIJ did not have jurisdiction because party that did not consent was neither member of League of Nations nor a party to Statute of the PCIJ); see also Yee, *supra* note 112, at 383 (reiterating that lack of consent may affect propriety of advisory opinion).

114. See *Western Sahara Case*, [1975] I.C.J. at 25, ¶ 34 (finding that facts of *Western Sahara Case* were different from those contemplated in previous instances where ICJ had declined to give advisory opinion, and that to issue advisory opinion would be within judicial character of ICJ); see also Yee, *supra* note 112, at 382-83 (observing that in *Western Sahara Case* ICJ reiterated principle that lack of consent does not deprive ICJ of jurisdiction and that ICJ issued advisory proceeding).

115. See *Western Sahara Case*, [1975] I.C.J. at 25 ¶¶ 32-33 (reiterating principle that jurisdiction in advisory proceedings is permissive, and that while lack of consent does not deprive ICJ of jurisdiction, it may make giving advisory opinion fall outside of judicial character); see also *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 47 (referring to principle that although lack of consent does not have bearing on jurisdiction for advisory proceeding, but may impact propriety of giving opinion).

116. See *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 47 (explaining that one way in which lack of consent may make issuance of advisory opinion fall outside of judicial character is if reply to request would bypass principle that State is not obliged to have its

*Sahara Case*, the ICJ concluded that the case involved a legal controversy that arose during the proceedings of the General Assembly, not during bilateral relations between two States, and thus the issuance of an advisory opinion would not violate the principles of judicial propriety.<sup>117</sup> Judge Owada and Judge Higgins expressed their belief that in granting jurisdiction in the *Construction of a Wall Case*, the ICJ should have addressed whether giving an opinion would bypass the principle that a State is not required to have its disputes settled by the ICJ without its consent.<sup>118</sup> Instead, the ICJ declared that due to the General Assembly's responsibility regarding the maintenance of international peace and security, the issues presented in the *Construction of a Wall Case* are express concerns of the General Assembly, and thus jurisdiction does not violate the principle set out in the *Western Sahara Case*.<sup>119</sup> Because the matter had not simply arisen

---

disputes subjected to judicial settlement); see also *Western Sahara Case*, [1975] I.C.J. at 25 ¶¶ 28-30, 33 (describing Spain's objection to exercise of jurisdiction because it did not consent and believed that for ICJ to issue advisory opinion would circumvent principle that State is not obligated to have its disputes settled before ICJ); Yee, *supra* note 112, at 384 (explaining that requests should not be granted if to respond to question would have effect of circumventing principle that State must consent to have its disputes brought before ICJ).

117. See *Western Sahara Case*, [1975] I.C.J. at 25, ¶ 34 (finding that to give response would not violate principle that States must give consent to have disputes settled because question arose out of proceedings of General Assembly and did not rise independently during bilateral relations); see also Yee, *supra* note 112, at 385 (noting that ICJ distinguished *Western Sahara Case* from *Eastern Carelia Case* by noting that issue in *Western Sahara Case* did not arise out of dispute between two parties or dispute between South Africa and United Nations).

118. See *Construction of a Wall Case*, 43 I.L.M. at 1094, ¶ 13 (separate opinion of Owada, J.) (citing I.C.J. Reports 1975, p. 25, ¶ 33) (noting that ICJ should have determined whether request circumvented principle that State should not have its dispute submitted to ICJ for settlement without its consent); see also *id.* at 1060, ¶¶ 12-13 (separate opinion of Higgins, J.) (noting that ICJ quickly drew analogies between *Construction of a Wall Case* and other advisory opinions and ignored relevant details that uniquely pertained to *Construction of a Wall Case* and should have addressed with greater scrutiny whether granting jurisdiction would bypass consent requirement and allow General Assembly to later exercise its powers).

119. See *Construction of a Wall Case*, 43 I.L.M. at 1026, ¶ 49 (noting that role of United Nations in Middle East and responsibility for maintenance of international peace and security make consequences of construction of separation barrier within jurisdiction for advisory proceedings); see also S.C. Res. 1269, *supra* note 7 (encouraging States to act against international terrorism); S.C. Res. 1368, *supra* note 7 (calling on international community to fight against international terrorism and expressing sympathy to victims of September 11th attacks); S.C. Res. 1373, *supra* note 7 (affirming Security Council Resolutions 1269 and 1368 and creating subsidiary body to monitor progress in fight against terrorism); G.A. Res. 49/60, *supra* note 7 (stating that acts that

as part of the bilateral dispute, the ICJ held the General Assembly could properly request advisory proceedings without the consent of the parties.<sup>120</sup>

The ICJ further noted in the *Western Sahara Case* that a request for an advisory opinion is improperly made by the General Assembly if the purpose is that it may later exercise its powers over that controversy based on the opinion of the ICJ.<sup>121</sup> In that case, the ICJ determined that giving an advisory opinion would not violate this principle because the General Assembly requested the advisory opinion in order to assist in its decolonization of Western Sahara.<sup>122</sup> Unlike the *Western Sahara Case*, the subject matter of the *Construction of a Wall Case* dealt with a matter that arose during the policy determinations regarding a dispute between the two parties, and the purpose of the request was to determine the consequences of choices that the General Assembly did not participate in making or altering.<sup>123</sup> The ICJ,

---

create terror in public are unjustifiable and calling on States to refrain from participation in organization of such acts); G.A. Res. 51/210, *supra* note 7 (reiterating position taken by General Assembly in Resolution 49/60).

120. See *Western Sahara Case*, [1975] I.C.J. at 24-25, ¶¶ 32-34 (stating that General Assembly could properly make request to ICJ because issue arose out of proceedings of General Assembly even though parties did not consent); see also *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 47 (explaining that in *Western Sahara Case*, General Assembly was able to make request for advisory opinion because question arose during proceedings of General Assembly); *id.* at 1070, ¶ 27 (separate opinion of Kooijmans, J.) (arguing that issues can be both bilateral dispute and community issue, and thus ICJ can answer question).

121. See *Western Sahara Case*, [1975] I.C.J. at 26-27, ¶ 39 (stating that Spain also argued that advisory opinion would be outside of judicial character because General Assembly issued request to ICJ so that it could later use advisory opinion to exercise its powers over settlement of dispute); see also *Construction of a Wall Case*, 43 I.L.M. at 1060, ¶¶ 12, 13 (separate opinion of Higgins, J.) (noting reservation in *Western Sahara Case* that General Assembly should not make request so that it may later act on decision of ICJ; criticizing that ICJ did not address the issue and positing that ICJ revised case law on this issue).

122. See *Western Sahara Case*, [1975] I.C.J. at 26-27, ¶ 39 (holding that General Assembly could properly request advisory opinion because question regarded proper role of General Assembly in decolonization of territory); see also *Construction of a Wall Case*, 43 I.L.M. at 1059-60, ¶ 11 (separate opinion of Higgins, J.) (noting that in *Western Sahara Case*, ICJ determined that consent was not needed to issue advisory opinion regarding proper role of General Assembly in decolonization of non-self-governing territory).

123. See G.A. Res. ES 10/14, *supra* note 15 (requesting that ICJ give advisory opinion regarding consequences of Israel's plan to build separation barrier between Israel and OPT); see also *Construction of a Wall Case*, 43 I.L.M. at 1069, ¶ 22 (separate opinion of Kooijmans, J.) (explaining that ES-10/14 indicates that General Assembly felt need to take action regarding Israel's decision to construct separation barrier and sought opinion of ICJ for purpose of taking action against construction of separation barrier).

however, never addressed this principle.<sup>124</sup>

The decision in the *Construction of a Wall Case* also impacted the exercise of jurisdiction over a bilateral dispute.<sup>125</sup> The ICJ drew an analogy to the *South West Africa Case* where the ICJ issued an advisory opinion regarding the impact for the State of South Africa of the termination of the South African Mandate.<sup>126</sup> Several Judges recognized, however, many subtleties that made the *Construction of a Wall Case* very different from the *South West Africa Case*.<sup>127</sup> In the *South West Africa Case*, the controversy was directly between the United Nations and South Africa, the request was made with reference to a Security Council decision, and the General Assembly sought advice on the consequences of its own action.<sup>128</sup> In the *Construction of a Wall Case*,

124. See *Construction of a Wall Case*, 43 I.L.M. at 1060, ¶ 13 (separate opinion of Higgins, J.) (stating that ICJ never addressed principle that requests should not circumvent consent and thus revised existing case law); see also *id.* at 1093-94, ¶ 12 (separate opinion of Owada, J.) (noting that matter appears to be brought to ICJ so that General Assembly can later exercise its powers for peaceful dispute of controversy, and that proper test for judicial propriety is whether answering request would be tantamount to issuing opinion regarding underlying bilateral dispute); *id.* at 1069-70, ¶¶ 22-25 (separate opinion of Koopmans, J.) (concluding that ICJ did not satisfactorily address whether nature of the question was within judicial character).

125. See *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 46 (stating that one argument against exercise of jurisdiction is that question concerns contentious matter between Israel and Palestine); see also *id.* at 1059, ¶¶ 6-7 (separate opinion of Higgins, J.) (noting that General Assembly should not get involved in matter between international parties, and in *Construction of a Wall Case* ICJ recognized that dispute was between two international actors); *id.* at 1091, 1093, ¶¶ 2, 10 (separate opinion of Owada, J.) (noting that ICJ should have more closely addressed nature of dispute in its determination not to exercise discretion).

126. See *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 48 (stating that while Israel and Palestine have expressed different views regarding legality of separation barrier, ICJ noted in *South West Africa Case* that parties have different views in every advisory proceeding); see also *South West Africa Case*, [1971] I.C.J. 16, 24 ¶ 34 (noting that parties have had different views in almost every advisory proceeding and that those views do not prevent ICJ from properly exercising jurisdiction).

127. See *Construction of a Wall Case*, 43 I.L.M. at 1058, ¶ 2 (separate opinion of Higgins, J.) (arguing that ICJ analogized *Construction of a Wall Case* to *South West Africa Case* without addressing many subtleties that make *Construction of a Wall Case* different); see also *id.* at 1093, ¶ 10 (separate opinion of Owada, J.) (concluding that ICJ did not examine details of *Construction of a Wall Case* that distinguish it from previous requests for advisory opinions, particularly, that ICJ inappropriately likened case to *South West Africa Case*).

128. See *South West Africa Case*, [1971] I.C.J. at 24, ¶32 (stating that request was made by United Nations organ which was seeking advice regarding its own actions in decolonization of non-self-governing territory); see also *Construction of a Wall Case*, 43 I.L.M. at 1093, ¶ 11 (separate opinion of Owada, J.) (reiterating that ICJ was asked to



the controversy was between Israel and Palestine.<sup>129</sup> The ICJ noted that because of the U.N.'s responsibilities regarding the maintenance of international peace and security, the construction of the separation barrier directly concerns the United Nations.<sup>130</sup> Additionally, the U.N. organs have manifested their responsibility through the adoption of various resolutions and the creation of subsidiary bodies.<sup>131</sup> The ICJ then found that because of these concerns and resolutions, the General Assembly sought the opinion to assist it in its proper function, therefore, to give an opinion would not violate principles of judicial propriety.<sup>132</sup>

The *Construction of a Wall Case* also changed the standard of evidence necessary for advisory proceedings to remain faithful to judicial character.<sup>133</sup> The determinative factor in deciding

---

render advisory opinion regarding legality of action taken by United Nations in *South West Africa Case*).

129. See *Construction of a Wall Case*, 43 I.L.M. at 1093, ¶ 11 (stating that unlike the *South West Africa Case* in which the ICJ was asked to render advisory opinion of legal consequences of action of United Nations organ, *Construction of a Wall Case* asked ICJ to make determination regarding consequences of Israeli action with regard to action impacting Palestine); see also *id.* at 1058-59, ¶¶ 1-6 (separate opinion of Higgins, J.) (reviewing factual background of two questions and determining that situation presented in *Construction of a Wall Case* is much different than one in *South West Africa Case*).

130. See *Construction of a Wall Case*, 43 I.L.M. at 1026, ¶ 49 (concluding that ICJ does not consider subject matter of request to be simply bilateral because powers and responsibilities of United Nations for maintenance of international peace and security make construction of separation barrier direct concern of United Nations); see also *id.* at 1070, ¶ 27 (separate opinion of Kooijmans, J.) (arguing that issues can be both bilateral dispute and community issue, and thus ICJ can answer question).

131. See *Construction of a Wall Case*, 43 I.L.M. at 1026, ¶ 49 (concluding that responsibility has been manifested by adoption of various resolutions regarding situation in Middle-East and creation of subsidiary bodies to oversee adoption of those resolutions); see also *id.* at 1070, ¶ 27 (separate opinion of Kooijmans, J.) (finding that ICJ can issue advisory opinion because nature of dispute makes it concern of entire international community).

132. See *Construction of a Wall Case*, 43 I.L.M. at 1025, ¶ 50 (finding that General Assembly issued request in *Construction of a Wall Case* to obtain assistance for proper exercise of its functions and because advisory opinion is related to matter of concern for United Nations that is part of broader frame of reference than bilateral dispute between Israel and Palestine and therefore request was proper); see also *Summary of Advisory Opinion*, *supra* note 15 (explaining that ICJ found that opinion was requested regarding matter of deep concern to United Nations and was asked for advice regarding General Assembly's proper exercise of functions and was thus proper).

133. See *Construction of a Wall Case*, 43 I.L.M. at 1026, ¶ 55 (observing that participants in proceedings raised challenge that ICJ did not have evidence necessary to reach conclusions regarding legal consequences of separation barrier); see also *id.* at 1078, ¶ 1 (declaration of Buergenthal, J.) (stating that Judge Buergenthal voted against exercise

whether the ICJ has the requisite information is whether there is sufficient evidence to allow the ICJ to arrive at a conclusion on any judicial fact which may be necessary for the advisory opinion.<sup>134</sup> In advisory proceedings, the ICJ is not bound simply to the information provided by the parties.<sup>135</sup> Israel relied on the *Peace Treaties Case* to allege that the ICJ could not issue an advisory opinion on an issue that raises questions of fact that cannot be fully understood without evidence provided by all parties to the conflict.<sup>136</sup> The ICJ however, determined that it could make a decision based on the amount of information that was presented to it.<sup>137</sup> Later, however, it stated that it was unable to conclude that the separation barrier was necessary based on the information it had.<sup>138</sup>

---

of jurisdiction in *Construction of a Wall Case* because he did not believe that ICJ had requisite facts to make determination).

134. See *Construction of a Wall Case*, 43 I.L.M. at 1027, ¶ 56 (observing that evidentiary standard is that ICJ must have sufficient information to make determination on any fact that will be relevant to conclusions of advisory opinion); see also *Western Sahara Case*, [1975] I.C.J. 12, 28-29, ¶ 46 (stating that determinative factor in deciding if ICJ has requisite information is whether ICJ will be able to arrive at conclusions, compatible with its judicial character, regarding every fact relevant to dispositive of advisory opinion); *Peace Treaties Case*, [1950] I.C.J. 65, 72 (setting standard of evidence necessary that was later applied in *Western Sahara Case* and *Construction of a Wall Case*).

135. See *Construction of a Wall Case*, 43 I.L.M. at 1096, ¶ 20 (separate opinion of Owada, J.) (stating that in advisory proceedings, ICJ is not bound by materials presented by parties); see also *id.* at 1096, ¶ 20 (declaration of Buergenthal, J.) (concluding that once Israel did not consent to proceedings, it was improper for ICJ to make decisions adverse to Israel assuming that it had relevant information without first determining if ICJ had all relevant information).

136. See *Construction of a Wall Case*, 43 I.L.M. at 1027, ¶ 55 (stating that Israel relied on *Peace Treaties Case* and contended that ICJ could not give advisory opinion on matters which raise questions of fact that cannot be fully understood without evidence presented by all parties); see also *Summary of Advisory Opinion*, *supra* note 15 (reiterating Israel's objection that for ICJ to give advisory opinion it would have to speculate about essential facts relevant to question of law).

137. See *Construction of a Wall Case*, 43 I.L.M. at 1027-28, ¶ 56-58 (reviewing evidence before ICJ and concluding that evidence is sufficient for ICJ to render advisory opinion that is in accordance with judicial character); see also *id.* at 1027, ¶ 56-58 (declaration of Buergenthal, J.) (stating that ICJ concluded that it had relevant information for making determination regarding legal consequences of separation barrier).

138. See *Construction of a Wall Case*, 43 I.L.M. at 1027, ¶ 140 (concluding that, based on information available, ICJ is not convinced that course of separation barrier was necessary to achieve security objectives); see also *id.* at 1080, ¶ 7 (declaration of Buergenthal, J.) (arguing that ICJ reaches conclusion that wall is not necessary to meet security objectives but does not address any facts relevant to Israel's claim of military exigency or national security); *id.* at 1096, ¶ 23 (separate opinion of Owada, J.) (arguing that ICJ's statement that it is not convinced that Israel's strategy was necessary for

While the nature of the dispute does not require the ICJ to refuse to issue an opinion, it does call for an extensive inquiry into judicial propriety.<sup>139</sup> Commentators suggest that the decision to evade the consent requirement and become involved in a bilateral dispute expanded the type of matter that can be brought before the ICJ and changed the role of the ICJ in the international system.<sup>140</sup> The ICJ, however, found no compelling reasons why it should not exercise its jurisdiction,<sup>141</sup> and by a vote of fourteen to one decided to comply with the request.<sup>142</sup>

---

security objectives is admission by ICJ that it does not have requisite facts to make determination regarding necessity of security barrier).

139. See *Construction of a Wall Case*, 43 I.L.M. at 1093-94, ¶ 12 (separate opinion of Owada, J.) (calling for greater inquiry into jurisdictional issues); see also *id.* at 1058, ¶ 2 (separate opinion of Higgins, J.) (stating that choice regarding discretion deserves more analysis due to difficult nature of decision); *id.* at 1069-71, ¶¶ 19-28 (separate opinion of Kooijmans, J.) (questioning ICJ's analysis of judicial propriety); Gordon, *supra* note 58 (noting that in future, General Assembly will be able to bring any matter before ICJ by passing resolutions and becoming involved in matter, making dispute not simply bilateral); McCarthy, *supra* note 21 (noting that allowing ICJ to become involved in bilateral disputes allows international community to become involved in dispute because submissions by non-parties are permitted during advisory proceedings).

140. See Gordon, *supra* note 58 (noting that ICJ disregarded consent requirement, one of cardinal protections guaranteed in ICJ Charter); see also Leavitt, *supra* note 57 (arguing that decision to hear case politicized ICJ); *Decision Dismisses Israel's Arguments*, *supra* note 12 (concluding that ICJ's decision to hear case called status of international law into question and that Opinion may provide precedent for ICJ to bring sovereign States before the ICJ and force State to defend policy before ICJ); Press Release GA/10246, *supra* note 94 (stating that several States believe decision to hear case improperly evaded consent requirement and inappropriately politicized ICJ); Wedgewood, *supra* note 21 (positing that to allow ICJ to intrude into policy matters of States will affect international community's perception of different conflicts); McCarthy, *supra* note 21 (observing that decision to hear case potentially undermines integrity of ICJ and integrity of international law, and decision changes role of ICJ because ICJ allows liberal submissions by non-parties during advisory proceedings, allowing all nations to become involved in addressing policy determinations of other States); Comments on White Paper, *supra* note 21 (noting potential effect on international law and that allowing ICJ to become involved in matters between States engages entire international community because in advisory proceedings submissions are allowed by non-parties); Greg Rose, *UN Court Clouds Better Judgment*, AUSTL. FIN. REV., July 13, 2004, available at 2004 WL 79461222 (remarking that decision to hear case turned ICJ into executive agency of General Assembly).

141. See *Construction of a Wall Case*, 43 I.L.M. at 1029, ¶ 65 (finding that ICJ found no compelling reason not to comply with request); see also *Summary of Advisory Opinion*, *supra* note 15 (noting that ICJ concluded that there was no compelling reason why it should decline jurisdiction).

142. See *Construction of a Wall Case*, 43 I.L.M. at 1054, ¶ 163(2) (stating that ICJ, by a vote of 14 to 1, decided to comply with request for Advisory Opinion); see also Press Release, Hague Decision on Security Fence "Shocking"; ADL says Israel Never Stood a Chance to Defend Itself, (July 9, 2004), available at <http://www.adl.org/PresRele/>

On July 9, 2004, the ICJ rendered its Advisory Opinion regarding the legal consequences of the construction of the separation barrier in the OPT.<sup>143</sup>

### B. *A New Interpretation of the Right to Self Defense*

Article 51 of the U.N. Charter allows a State to act in defense of its citizens without the permission of the Security Council.<sup>144</sup> The text of Article 51 has traditionally been interpreted to carry several requirements including: (1) that the State have been subjected to an armed attack; (2) that the response of the State must be proportional to the threat posed; and (3) that a State must have exhausted all practical means of preventing the attack.<sup>145</sup> A further issue in the application of Article 51 concerns the origin of the attack.<sup>146</sup>

There is little authority on what constitutes an armed attack.<sup>147</sup> Some scholars argue that because of the evolution of

---

IslME\_62/4530\_62.htm (noting potential changes in international law based on ICJ's decision).

143. See *Construction of a Wall Case*, 43 I.L.M. 1009 (announcing date that opinion was rendered); see also Press Release 2004/23, Court Will Render its Advisory Opinion on Friday 9 July 2004, at 3 p.m., (June 25, 2004), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> [hereinafter Press Release 2004/23] (announcing date and time that ICJ would render opinion); Press Release 2004/28, *supra* note 95 (announcing that ICJ rendered its opinion and found separation barrier violated international law).

144. See U.N. CHARTER art. 51 (stating in relevant part that nothing in Charter shall impair right of self-defense if armed attack occurs against Member State); see also Kastenber, *supra* note 2, at 107 (explaining that Article 51 of U.N. Charter enshrines inherent right of self-defense for Members of United Nations); *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶¶ 138-39 (noting potential relevance of principle of self-defense but noting that principle does not apply to case at bar).

145. See Saura, *supra* note 2, at 24 (recalling that act can only be justified by principle of self-defense if it satisfies conditions of immediateness, necessity, and proportionality); see also John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 314 (2003) (arguing that right to self defense is limited to instances of armed attack against State) [hereinafter Cohan, *Bush Doctrine*]; Walker, *supra* note 63, at 522 (stating that necessity and proportionality are basic elements of self-defense response); Kastenber, *supra* note 2, at 108-09 (explaining that while no definition of self-defense was provided in U.N. Charter, ICJ provided some explanation in *Nicaragua Case*).

146. See Kastenber, *supra* note 2, at 108 (noting that no international convention interprets or defines requirements of Article 51 of U.N. Charter but that there have been many interpretations of its requirements); see also King, *supra* note 1, at 461 (discussing that while the ICJ noted in *Nicaragua Case* that armed attack must come from State, other interpretations suggest that there is no such requirement in Article 51 of U.N. Charter).

147. See King, *supra* note 1, at 461 (explaining that there has been debate concern-

modern warfare and the grave threat posed by nuclear and biological weapons, States no longer have to wait until an actual armed attack occurs.<sup>148</sup> However, the ICJ, in *Nicaragua v. United States of America* ("Nicargua Case") adopted a very strict interpretation of armed attack and held that merely assisting rebels did not constitute a threat posed by the State.<sup>149</sup> The ICJ held that the behavior of Nicaragua, while an unlawful use of force, did not constitute an armed attack under Article 2(4) of the U.N. Charter.<sup>150</sup> Furthermore, it stated that in determining if an act constituted an armed attack, it is necessary to make a distinction between the gravest uses of force and other less severe forms.<sup>151</sup> Although the acts in that case did not constitute an attack, the ICJ did recognize that the sending of armed groups into another

---

ing what actually constitutes armed attack); see also Beard, *supra* note 61, at 567 (concluding that while U.N. Charter provides that States can act on inherent right to self-defense, requirements of self-defense, particularly of what constitutes and armed attack, have been debated); Murphy, *Terrorism and the Concept of Armed Attack*, *supra* 66, at 44 (observing that while all agree that there is right to act in self-defense regarding in response to armed attack, courts have not defined what constitutes armed attack).

148. See Cohan, *Bush Doctrine*, *supra* note 145, at 316 (explaining that because of modern developments in warfare, scholars suggest that State would not have to wait until an actual attack occurs to act in self-defense); see also Walker, *supra* note 63, at 522-23 (noting that anticipatory self-defense is not an issue because in time of information warfare threat from weapons of mass destruction makes debate regarding anticipatory self-defense moot).

149. See Cohan, *Bush Doctrine*, *supra* note 145, at 317 (stating that ICJ's narrow view of armed attack in *Nicaragua Case* led ICJ to conclude that assistance to rebels did not constitute armed attack and thus the United States could not act against government of Nicaragua in self-defense); see also Kastenber, *supra* note 2, at 110 (arguing that in ICJ's decision in *Nicaragua Case*, ICJ never mentioned any relevant aspect of sovereignty).

150. See *Nicaragua Case*, [1986] I.C.J. 14, 110-11, ¶ 211 (holding that States do not have right to act in self-defense unless they have been victim of armed attack); see also U.N. CHARTER art. 2, ¶ 4 (providing that States shall refrain from the use of force in their international relations); Harvey Rishikof, *When Naked Came the Doctrine of "Self-Defense": What is the Proper Role of the International Court of Justice in Use of Force Cases*, 29 YALE J. INT'L L. 331, 338 (2004) (explaining that ICJ found that self-defense was not relevant justification for U.S. action against Nicaragua because actions of Nicaraguan Government in assisting Contras did not constitute armed attack under Article 2(4) of U.N. Charter); Kastenber, *supra* note 2, at 109 (noting that ICJ held in *Nicaragua Case* that States could not justifiably act in self-defense unless event State is responding to constitutes armed attack).

151. See *Nicaragua Case*, [1986] I.C.J. at 101, ¶ 191 (stating that gravest uses of force constitute armed attack, while less severe actions are merely violations of U.N. Charter); see also *Oil Platforms Case*, ¶ 51, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF) (describing holding of *Nicaragua Case* and noting importance of determining whether attack constituted use of force of gravest form); Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 45 (commenting that in determining if act constitutes armed attack, must consider scale of actions).

State could constitute an armed attack.<sup>152</sup>

In the *Oil Platforms Case*, the ICJ reviewed the U.S. armed attack on three offshore oil platforms that were operated by the National Iranian Oil Company.<sup>153</sup> The United States justified its use of force under Article 51 of the U.N. Charter, alleging that Iran attacked a U.S. ship.<sup>154</sup> The ICJ stated that it would review the actions of the United States within its understanding that a State is prohibited from using force against another and the qualification that a State is permitted to exercise the right of self-defense.<sup>155</sup> Furthermore, the ICJ announced that for the United States to use the self-defense justification, the attacks to which it responded must have constituted an armed attack within the meaning of Article 51 of the U.N. Charter, and as understood by the international customary law.<sup>156</sup> The international commu-

152. See Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 51 (explaining that in *Nicaragua Case*, ICJ associated armed attack with idea of military action, but did acknowledge idea that attacks could arise in other ways such as sending armed groups into another State); see also Glennon, *supra* note 25, at 541-42 (observing that while ICJ found that Nicaragua's assistance did not constitute armed attack, support or sending armed bands into another State would constitute armed attack).

153. See *Oil Platforms Case*, ¶¶ 1, 25, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_jjudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_jjudgment_20031106.PDF) (stating that Government of Islamic Republic of Iran filed application instituting proceedings against United States regarding dispute over armed attack of three offshore oil platforms and reporting that United States justified attacks by stating that it was acting in self-defense); see also Stewart M. Young, *Destruction of Property (on an International Scale): the Recent Oil Platforms Case and the International Court of Justice's Inconsistent Commentary on the Use of Force by the United States*, 30 N.C. J. INT'L L. & COM. REG. 335, 337 (2004), (observing that in 2003, ICJ finally gave opinion in contentious matter involving U.S. force against two Iranian offshore oil platforms and an oil complex in 1987 and 1988).

154. See *Oil Platforms Case*, ¶ 25, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_jjudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_jjudgment_20031106.PDF) (stating that United States attributed attack against Kuwaiti ship *Sea Isle City*, ship that was reflagged to United States, to Iran and attacked offshore Iranian installations claiming self-defense); see also Young, *supra* note 153, at 345-46 (explaining that United States attacked Iranian platforms in response to attacks against tankers and under justification of self-defense).

155. See *Oil Platforms Case*, ¶ 43, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_jjudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_jjudgment_20031106.PDF) (stating that ICJ would have to review action in light of prohibition against use of force and qualification that States are permitted to act in self-defense); see also Young, *supra* note 153, at 353 (explaining that ICJ stated it would review actions of United States by considering principle that States are prohibited from using force against other States and principle that State has right to act in self-defense).

156. See *Oil Platforms Case*, ¶ 51, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_jjudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_jjudgment_20031106.PDF) (concluding that for United States to show that it was legally justified in its use of force, had to show that attacks attributed to Iran constituted armed attack within meaning of Article 51 of U.N. Charter and as

nity has indicated, in the wake of the September 11th attacks, that terrorist strikes constitute an armed attack.<sup>157</sup>

In the *Oil Platforms Case* the ICJ addressed whether a series of attacks would constitute an armed attack for the purposes of Article 51 of the U.N. Charter.<sup>158</sup> The ICJ found that the series of attacks that the United States attributed to Iran did not constitute an armed attack because they could not be considered one of the gravest forms of the use of force.<sup>159</sup> In the past, the international community criticized assertions that terrorist attacks

---

understood in customary international law); see also Young, *supra* note 153, at 354 (explaining that in *Oil Platforms* case, ICJ held that United States could only use justification of self-defense if actions it was responding to could be attributed to armed attack as was understood in both U.N. Charter and international customary law).

157. See Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 996-97, (2001) (arguing that international acceptance of United States' use of force in response to September 11th attacks assimilated attacks by terrorist organization to armed attack by another State); see also Ian Johnstone, *The US-UN Relations After Iraq: the End of the World (Order) as We Know it?*, 15 EUR. J. INT'L L. 813, 829 (2004) (explaining that almost all States came to agree that attacks by terrorist organizations constitute armed attack that would merit self-defense justification for use of force); Guillaume, *supra* note 66, at 546 (noting that majority of authors treat acts of terrorism reaching extent and gravity of September 11th attacks as constituting armed attack); Stahn, *supra* note 1, at 37 (concluding that there is almost unanimous recognition that acts of terrorism fit within parameters of Article 51 of U.N. Charter, even if they are carried out by independent actors); Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 47-48 (concluding that September 11th attacks constituted an armed attack because of scale of attacks, because United States perceived incidents as being same as military attack, and because interpretation that incidents constituted armed attack was accepted by other States); Jose E. Alvarez, *The UN's "War" on Terrorism*, 31 INT'L J. LEGAL INFO. 238, 243 (2004) (stating that Security Councils' response after United States initiated war in Afghanistan indicates that terrorist violence of scale it reached during September 11th attacks constitutes armed attack).

158. See *Oil Platforms Case*, ¶ 64, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_judgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_judgment_20031106.PDF) (stating that ICJ would examine U.S. claim that series of incidents constituted armed attack for purposes of Article 51 of U.N. Charter); see also Young, *supra* note 153, at 365-66 (observing that ICJ addressed claim that series of attacks made the Gulf unsafe but concluded that United States did not provide sufficient evidence to prove that attacks created impediment to trade and navigation, and concluding that ICJ did not engage in same analysis of U.S. claims as it did of Iranian claims, indicating that holding was politically commentary that deviated from principles of international law).

159. See *Oil Platforms Case*, ¶¶ 51, 64, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_judgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_judgment_20031106.PDF) (stating that series of attacks did not constitute armed attack because it did not satisfy requirement set forth in *Nicaragua Case* that use of force must be of most grave form to constitute armed attack); see also *Nicaragua Case*, [1986] I.C.J. 14, 101, ¶ 191 (concluding that in determining if State has been subject to armed attack it is necessary to determine if attack was use of grave force).

met the level of an armed attack.<sup>160</sup> However, the international community did not condemn the use of force in response to the September 11th attacks, the final in a series of attacks attributed to al Qaeda, indicating that the acts were grave enough to constitute an armed attack.<sup>161</sup>

Further, the ICJ has held that a State using self-defense to justify its actions against another State must prove that its actions were necessary and proportional to the threat posed to it.<sup>162</sup> These principles only require that the kinds of force used are those necessary for subduing the enemy, without employing ex-

---

160. See Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 46 (observing that in past, international community had not accepted self-defense as justification for use of force in response to terrorist attacks because actions did not constitute armed attack); see also Beard, *supra* note 61, at 562-65 (remarking that past military action against terrorist attacks had received varying responses from international community partly because international community was not convinced strikes against United States were extensive enough to constitute armed attack).

161. See *Oil Platforms Case*, ¶ 51, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_judgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_judgment_20031106.PDF) (noting that series of attacks will only be considered armed attack if is grave use of force); see also *Nicaragua Case*, [1986] I.C.J. at 101, ¶ 191 (concluding that must distinguish between use of force and grave use of force when determining if armed attack occurred); S.C. Res. 1368, *supra* note 7 (condemning September 11th attacks and recognizing need for international community to fight against international terrorism); S.C. Res. 1373, *supra* note 7 (affirming Security Council Resolutions 1269 and 1368 and creating subsidiary body to monitor progress in fight against terrorism); Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 47 (observing that use of force in September 11th attacks was grave use of force and that international community accepted this interpretation, which was demonstrated through support given to Operation Enduring Freedom); Stahn, *supra* note 1, at 36 (concluding that force of September 11th attacks was of greater magnitude than other terrorist strike); King, *supra* note 1, at 471 (finding that threat of additional attacks of magnitude of September 11th attacks has changed way that international law is used and interpreted because demonstrated the enormity of terrorist capabilities); Beard, *supra* note 61, at 574-75 (remarking strikes constitute armed attack because caused extensive loss of life and severe damage to property).

162. See *Oil Platforms Case*, ¶¶ 51, 74, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_judgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_judgment_20031106.PDF) (explaining that lawfulness of response to armed attack depends on whether response was necessary and proportional); see also *Nicaragua Case*, [1986] I.C.J. at 94, 103, ¶ 176, 194 (holding that whether response to armed attack is lawful depends on States observance of requirements of necessity and proportionality and that those two conditions originate in customary international law); *Nuclear Weapons Case*, [1996] I.C.J. 226, 245, ¶ 41 (stating that conditions of proportionality and necessity imposed on exercise of right of self-defense come from customary international law); Rishikof, *supra* note 150, at 333 (explaining that ICJ found in *Oil Platforms Case* that United States had not carried its burden in proving that its actions were necessary and proportionate to threat posed and thus could not rely on self-defense to justify actions); Feinstein, *supra* note 1, at 78 (stating that State's exercise of self-defense can not be excessive or unreasonable).



cessive force, and while minimizing the number of deaths and drain on physical resources.<sup>163</sup> In the *Oil Platforms Case*, the ICJ stated that the principle of necessity is objective and looked at the *Nicaragua Case* for guidance in deciding that the United States was not justified in attacks against the oil platforms because they were not a necessary action.<sup>164</sup> According to the ICJ, relevant information would include the nature of the target of operation, evidence that the United States had complained of the threats posed in the past, and proof that the target had previously been identified as a military target.<sup>165</sup> The ICJ also con-

---

163. See Walker, *supra* note 63, at 526 (explaining that principle of necessity involves the degree and amount of force required for partial or complete subduing of enemy with limited expenditure of life, physical resources, and time, while proportionality principle prohibits use of any kind or degree of force not required for submission of enemy with minimum toll on life, time, and physical resources); see also Schmitt, *Assessment*, *supra* note 1, at 753 (acknowledging that principle of proportionality limits force that can be used, but arguing that given the financial nature of terrorist and the egregious nature of weapons of mass destruction, it is difficult to imagine strike that would be disproportionate); Schmitt, *Preemptive Strategies*, *supra* note 76, at 532-33 (observing that necessity requires that all reasonable alternatives have been exhausted and that proportionality limits action to acts necessary to defeat ongoing attack or deter future attacks, and concluding that while scope of Operation Enduring Freedom was much larger than that of attacks against United States, operation was proportional need to deny al Qaeda sanctuary in Afghanistan); King, *supra* note 1, at 466-67 (noting that while some argue immediacy is element of necessity, it is not necessary when attack is part of ongoing campaign); Beard, *supra* note 61, at 574-75 (noting that magnitude of September 11th attacks was greater than any previous attack and that it was part of sustained and continuous attack against United States and concluding that because military operations were tailored to minimize civilian casualties and because of important objective of eliminating threat of international terrorism, military force satisfies requirement of proportionality). But see Saura, *supra* note 2, at 25 (arguing that intensity of Operation Enduring Freedom and fact that operation sought to overthrow government make action inconsistent with concept of proportionality).

164. See *Oil Platforms Case*, ¶ 76, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF) (holding that United States did not prove that it was necessary to respond to Iranian attacks and stating that there was no evidence that United States had previously complained of military activity on the platforms); see also Young, *supra* note 153, at 359-60 (explaining that while United States provided evidence regarding the threat posed by targets it attacked, ICJ found that actions taken by United States were not necessary based on threat posed).

165. See *Oil Platforms Case* ¶ 76, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF) (concluding that United States did not prove that military operations were necessary because it did not provide enough information regarding military presence on oil platforms, the United States did not make complaints to Government of Iran regarding military presence on platforms, and because United States had not previously identified platforms as military targets); see also Beard, *supra* note 61, at 587-88 (stating that facts surrounding use of force in Operation Enduring Freedom indicate that action was necessary because was response to ongoing campaign against the United States by group whose leaders have stated that

cluded, in the *Oil Platforms Case*, that the actions of the United States were not proportional to the threat posed.<sup>166</sup> In its discussions, however, the ICJ never announced clear principles that could be used in addressing the necessity and proportionality of military action.<sup>167</sup>

The text of Article 51 of the U.N. Charter does not require that the armed attack must originate from any particular type of actor.<sup>168</sup> Many look at the text to indicate that an armed attack does not have to be attributed to a State for another to invoke the protections of Article 51.<sup>169</sup> On this point, many look at in-

---

they will continue until America is destroyed); King, *supra* note 1, at 466-69 (noting that while some believe that immediacy is essential component of necessity, fact that United States was acting in response to ongoing campaign would satisfy necessity requirement).

166. See *Oil Platforms Case*, ¶ 77, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF) (briefly addressing requirement of proportionality and finding that action was not proportionate because mining of single U.S. warship did not merit initiation of military operation); see also Young, *supra* note 153, at 358-59 (observing that ICJ found that response was not proportional because was not convinced that it was necessary).

167. See *Oil Platforms Case*, ¶ 77, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.PDF](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.PDF) (concluding that U.S. action was not proportional because attack that damaged, rather than destroyed, single U.S. warship, did not merit entire military operation); see also Young, *supra* note 153, at 360-61 (explaining that while ICJ found that US action was neither necessary nor proportionate, it never articulated principles that could be used for addressing the necessity or proportionality of future action); Rishikof, *supra* note 150, at 332 (observing that ICJ's ruling in *Oil Platforms* case was formalistic and disconnected and did little to elucidate principles of self-defense).

168. See U.N. CHARTER art. 51 (stating that nothing in Charter shall affect inherent right of State to act in self-defense so long as it does not interfere with actions of Security Council); see also *Construction of a Wall Case*, 43 I.L.M. 1009, 1063, ¶ 33 (July 9, 2004) (separate opinion of Higgins, J.) (noting that nothing in text of Article 51 of U.N. Charter requires that attack be attributed to another State, but instead that requirement was result of interpretation in *Nicaragua Case*); Stahn, *supra* note 1, at 42 (explaining that nothing in the text of Article 51 of U.N. Charter requires that armed attack be attributed to State for another State to invoke the inherent right to self-defense); Paust, *supra* note 13, 534 (observing that there is agreement that armed attack is prerequisite for use of self-defense but that nothing requires that armed attack be attributed to State); Feinstein, *supra* note 1, at 67-68 (stating that nothing in U.N. Charter requires that armed attack can only originate with State and arguing that Article 51 of U.N. Charter was drafted in manner broad enough to permit use of force in self-defense against non-State actors).

169. See Murphy, *Terrorism and the Concept of Armed Attack*, *supra* note 66, at 50 (arguing that nothing in text of Article 51 of U.N. Charter requires that act be attributed to State in order for action in self-defense to be justified, and that because U.N. Charter preserves inherent right to self-defense, it preserves right to respond to attacks wherever they come from); see also Beard, *supra* note 61, at 567 (noting that in analyzing use of Article 51 of U.N. Charter, many look towards reference to inherent right to self-defense in Article 51 of U.N. Charter); Leo Von den hole, *Anticipatory Self-Defence Under*

ternational custom and note that the North Atlantic Treaty Organization ("NATO"), the Organization of American States ("OAS") and the United Nations supported the response to the September 11th attacks, and argue that this supports the conclusion that the acts do not have to be attributed to a State in order to merit action in self-defense.<sup>170</sup> On the other hand, some commentators, suggest that an armed attack must come from a State in order for another State to justify the use of force in response.<sup>171</sup>

In the *Construction of a Wall Case* the ICJ took the latter stance and held that Israel could not use the threat of terrorist attacks emanating from the OPT to justify its plan to build the separation barrier because the attacks were not attributed to a State.<sup>172</sup> This interpretation came from the ICJ's previous hold-

---

*International Law*, 19 AM. U. INT'L L. REV 69, 79-81 (2003) (concluding that preconditions of exercise of right to self-defense stated in Article 51 of U.N. Charter are purposely vague, indicating framers intent to maintain customary right as opposed to statutory right); Stahn, *supra* note 1, at 36 (observing that framers of U.N. Charter drafted Article 51 of U.N. Charter broadly enough to allow for use of self-defense against acts emanating from non-State actors).

170. See Guilleme, *supra* note 66, at 546 (noting that there is debate regarding whether terrorist attacks must be attributed to State in order to justify use of force under Article 51 of U.N. charter and that many point to international support of United States action to indicate that Article 51 of U.N. Charter does not require that acts be attributed to State in order for use of force to be permitted); see also Johnstone, *supra* note 157, at 828 (explaining that international community supported claim that United States had been subject to armed attack during strikes against it on September 11, 2001); Stahn, *supra* note 1, at 37 (stating that near unanimous official recognition exists that terrorism carried out by private actors fits within parameters of Article 51 of U.N. Charter); Schmitt, *Preemptive Strategies*, *supra* note 76, 536-39 (observing that NATO and OAS and Australia, Canada, the Czech Republic, Georgia, Italy, Japan, the Netherlands, New Zealand, Norway, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, South Korea, Tajikistan, Turkey, Uzbekistan, and United Kingdom all provided support to Operation Enduring Freedom, indicating that States apply law of self-defense to acts perpetrated by non-State actors).

171. See *Construction of a Wall Case*, 43 I.L.M. 1009, 1049-50, ¶ 139 (July 9, 2004) (stating that armed attack must be attributed to State in order for exception to prohibition of use of force to apply); see also Guilleme, *supra* note 66, at 546 (noting that many authors suggest that while attacks by terrorist organizations that reach level of gravity of September 11th attacks are seen by many as armed attacks, such attacks might need to be attributed to State in order for another State to be justified under Article 51 of U.N. Charter to use force); Schmitt, *Preemptive Strategies*, *supra* note 76, at 536 (observing that some commentators suggest that law of self-defense assumes that attack was perpetrated by another State).

172. See *Construction of a Wall Case*, 43 I.L.M. at 1049-50, ¶ 139 (finding that Israel can not use self-defense to justify its actions because attacks can not be attributed to State and that Resolutions 1368 and 1373 do not apply because Israel exercise control

ing in the *Nicaragua Case*.<sup>173</sup> In that case, the ICJ held that in order for a State to be held accountable for the actions of armed groups, there must be evidence proving that the State directed or enforced the commission of those acts.<sup>174</sup>

Additionally, Article 38 of the ICJ Statute states that the ICJ shall apply international custom as evidence of generally accepted international law in exercising its proper function.<sup>175</sup> Since 1945, the year in which the U.N. Charter was adopted, the nature of war has changed, and the threats posed to States are

---

over OPT and thus situation is different from one contemplated in those resolutions because the attacks originated in area not controlled by United States); *see also id.* at 1063, ¶ 33 (separate opinion of Higgins, J.) (noting that nothing in text of Article 51 of U.N. Charter requires that attack come from another State, rather it is result of another ICJ determination in *Nicaragua Case*); *id.* at 1072, ¶ 35 (July 9, 2004) (separate opinion of Kooijmans, J.) (concluding that Security Council Resolution 1368 and 1373 recognized new right of self-defense and that ICJ bypassed new element of international law, implications of which were yet to be determined, but concluded that provisions were not actually relevant because acts were not international acts but originated from territory controlled by Israel).

173. *See Construction of a Wall Case*, 43 I.L.M. at 1063, ¶ 33 (separate opinion of Higgins, J.) (noting that nothing in text of Article 51 of U.N. Charter requires that attack come from another State, rather it is result of another ICJ determination in *Nicaragua Case*); *see also id.* at 1072, ¶¶ 35-36 (separate opinion of Kooijmans, J.) (finding that Security Council Resolutions 1368 and 1373 recognized new right of self-defense and that ICJ bypassed new element of international law, implications of which were yet to be determined, but concluded that provisions weren't actually relevant because acts were not international acts but originated from territory controlled by Israel).

174. *See Nicaragua Case*, [1986] I.C.J. 14, 64-65, ¶ 115 (holding that for United States to justifiably act in self-defense against Nicaragua, it must provide evidence that any Government assisted in orchestration of attacks); *see also* Feinstein, *supra* note 1, at 68-69 (explaining that in *Nicaragua Case*, ICJ ruled that for State to be legally accountable for actions of armed groups, evidence must support conclusion that it assisted in organization or commission of attacks).

175. *See* Statute of the I.C.J., art. 38 (stating that international custom is evidence of generally-accepted law and should be used by ICJ in exercise of its function of determining disputes in accordance with international law); *see also Nicaragua Case*, [1986] I.C.J. at 194, ¶ 176 (holding that whether response to armed attack is lawful depends on State's observance of requirements of necessity and proportionality and that those two conditions originate in customary international law); *Nuclear Weapons Case*, [1996] I.C.J. 226, 245, ¶ 41 (stating that conditions of proportionality and necessity imposed on exercise of right of self-defense come from customary international law); Cohan, *Bush Doctrine*, *supra* note 145, at 292 (concluding that ICJ ranks international custom as source of accepted international law second to use of treaties); King, *supra* note 1, at 471 (concluding that threat of attacks such as those that occurred on September 11th has changed way that international law is used and interpreted because demonstrated enormity of terrorist capabilities). *But see* Saura, *supra* note 2, at 25 (observing that Operation Enduring Freedom was launched almost one month after September 11th attacks and thus were not necessary to prevent immediate threat).

no longer the same as those that the framers contemplated.<sup>176</sup> Recently, the international community has become more aware of the threat posed by terrorism.<sup>177</sup> General Assembly Resolution 49/60 was passed by the General Assembly in 1994 which adopted the Declaration to Eliminate International Terrorism.<sup>178</sup> Additionally, Resolution 1269 was passed by the Security Council in 1999.<sup>179</sup> It condemned all acts of terrorism, regardless of their origin and stated that they pose a threat to international peace and security.<sup>180</sup> Furthermore, NATO, the OAS, and the United Nations supported the response to the September 11th attacks, indicating that there is international consensus that self-defense can justifiably be used in response to acts of terrorist organizations.<sup>181</sup>

---

176. See Saura, *supra* note 2, at 8 (noting that international community has become more aware of threat posed by terrorism since the 1960's); see also Sadat, *supra* note 2, at 139 (stating that international leaders believe that threat of international terrorism will grow in importance in future); Philpott, *supra* note 2, 982 (explaining that religion has become important in international politics and that non-State actors cause conflicts that take heaviest toll on sovereign States); Kastenber, *supra* note 2, at 105 (concluding that while international law regarding use of force was originally designed to regulate interstate warfare to protect civilians from atrocities of war, law should be applied to terrorist attacks as well because such acts should not be tolerated when there is existing framework to review illegal acts).

177. See Saura, *supra* note 2, at 8 (noting that international community has become more aware of threat posed by terrorism since the 1960's); see also Sadat, *supra* note 2, at 139 (stating that international leaders believe that threat of international terrorism will grow in future).

178. See G.A. Res. 49/60, *supra* note 7 (declaring that General Assembly was dedicated to eradicating all acts of international terrorism); see also Feinstein, *supra* note 1, at 62-63 (noting that General Assembly adopted Resolution 49/60 which adopted Declaration on Measures to Eliminate International Terrorism in which General Assembly stated that acts of international terrorism threaten security of all States); Sadat, *supra* note 2, at 149, 149 nn. 42-43 (stating that General Assembly has indicated willingness to address threats posed by international terrorists, position it adopted in Declaration on Measures to Eliminate International Terrorism).

179. See S.C. Res. 1269, *supra* note 7 (condemning acts of international terrorism); see also Saura, *supra* note 2, at 16 (stating that Security Council passed Resolution 1269 in 1999, which recognized threat posed by international terrorism).

180. See S.C. Res. 1269, *supra* note 7 (stating that acts of international terrorism pose threat to international peace and security); see also Saura, *supra* note 2, at 16 (explaining that Security Council Resolution 1269 viewed international terrorism as new threat to peace and security, but that resolution was adopted without specific reference to any case).

181. See Guilleme, *supra* note 66, at 546 (noting that there is debate regarding whether terrorist attacks must be attributed to State in order to justify use of force under Article 51 of U.N. Charter and that many point to international support of United States action to indicate that Article 51 of U.N. Charter does not require that acts be attributed to State for use of force to be permitted); see also Johnstone, *supra*

The United Nations applied the principle of self-defense against acts of international terrorism in response to terrorist attacks against the United States.<sup>182</sup> Security Council Resolution 1368, adopted immediately after the September 11th attacks, condemned the incidents and stated that the attacks, like any act of international terrorism, threatened international peace and security.<sup>183</sup> Additionally, Security Council Resolution 1373 affirmed the need for international cooperation against terrorism and the inherent right to self-defense.<sup>184</sup> In reaffirming the right of self-defense in the preambles of both of the Resolutions, the Security Council indicated that the United States had been the victim of an armed attack.<sup>185</sup> Both of these Resolutions

---

note 157, at 829 (explaining that international community supported claim that United States had been subject to armed attack during the September 11th attacks); Stahn, *supra* note 1, at 37 (stating that near unanimous official recognition exists that terrorism carried out by private actors fits within parameters of Article 51 of U.N. Charter); Schmitt, *Preemptive Strategies*, *supra* note 76, at 536-39 (observing that NATO and OAS and Australia, Canada, Czech Republic, Georgia, Italy, Japan, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, South Korea, Tajikistan, Turkey, Uzbekistan and United Kingdom all provided support to Operation Enduring Freedom indicating that States apply law of self-defense to acts perpetrated by non-State actors).

182. See S.C. Res. 1373, *supra* note 7 (finding that acts of terrorists threaten international peace and security, recognizing need to combat international terrorism, affirming right to act against threats of terrorism, and calling on States to suppress terrorist acts); see also S.C. Res. 1368, *supra* note 7 (calling on international community to strengthen efforts to combat terrorist activities); *Construction of a Wall Case*, 43 I.L.M. 1009, 1072, ¶ 35 (July 9, 2004) (separate opinion of Kooyimans, J.) (noting that Security Council Resolutions 1368 and 1373 recognize need to combat international terrorism but make no mention of requirement that act be by one State against another); Lubet, *supra* note 19 (noting that logic of ICJ in Advisory Opinion would indicate that United States would not be justified in acting against al Qaeda, but that action was permitted by Security Council in resolutions 1368 and 1373); *New U.N. Assault*, *supra* note 20 (noting that ICJ advisory opinion had potential to challenge justifications used by United States in entering War on Terror).

183. See S.C. Res. 1368, *supra* note 7 (calling on international community to strengthen efforts to combat terrorist activities); see also Saura, *supra* note 2, at 19 (noting that Security Council Resolution 1368 condemned attacks against United States as acts of international terrorism that threaten international peace and security).

184. See S.C. Res. 1373, *supra* note 7 (calling on international community to fight against international terrorism and condemning September 11th attacks); see also Saura, *supra* note 2, at 19 (arguing that while Security Council Resolution 1373 reaffirmed need for cooperation in fight against international terrorism and affirmed right to self-defense there is no link to September 11th attacks or any other act of aggression).

185. See S.C. Res. 1368, *supra* note 7, at preamble (condemning September 11th attacks, affirming right to act in self-defense and calling on international community to fight against international terrorism); see also S.C. Res. 1373, *supra* note 7, at preamble

make reference to Resolution 1269, linking the right to act in self-defense to the necessity of suppressing terrorist acts regardless of who commits them.<sup>186</sup> Commentators suggest that these resolutions indicate that the use of force against terrorist organizations is permitted by the U.N. Charter.<sup>187</sup>

### III. IMPLICATIONS OF THE NEW PRECEDENT

Despite the international community's view on terrorism and the right to defend against acts of terrorism, the ICJ's recent decision in the *Construction of a Wall Case* significantly impacts the War on Terror.<sup>188</sup> First, the ICJ may now bypass any jurisdictional questions regarding consent, a bilateral dispute, or lack of

---

(reiterating principles expressed in Resolution 1368 and creating a body to oversee fight against international terrorism); Johnstone, *supra* 157, at 828 (explaining that Security Council supported claim that United States had been victim of armed attack on September 11, 2003 by affirming right to self-defense in preambular paragraphs of Security Council Resolutions 1378 and 1373); Beard, *supra* note 61, at 568 (concluding that September 11th attacks constitute armed attack implicit in U.N. Security Council's affirmation of right to self-defense in Security Council Resolutions 1368 and 1373).

186. See S.C. Res. 1269, *supra* note 7 (stating that Security Council finds that international terrorism poses threat to international peace and security and that it is dedicated to fight against international terrorism); see also S.C. Res. 1368, *supra* note 7 (condemning September 11th attacks, affirming right of self-defense found in Article 51 of U.N. Charter and reiterating principles of Resolution 1269); S.C. Res. 1373, *supra* note 7 (reaffirming Resolutions 1269 and 1368 and creating subsidiary body to oversee fight against international terrorism).

187. See Feinstein, *supra* note 1, at 72 (explaining that Security Council Resolutions 1368 and 1373 indicate that self-defense is proper justification for use of force against terrorist organizations because Security Council affirmed right of self-defense under U.N. Charter at same time that it stated that acts of international terrorism pose threat to peace and security); see also Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT'L & COMP. L. 851, 863 (2004) (arguing that there would be no reason for Security Council to make reference to self-defense in Security Council Resolutions 1368 and 1373 if it did not consider principle relevant to threats posed by international terrorism); Schmitt, *Assessment*, *supra* note 1, at 748 (acknowledging that because no one suggested that State was behind attacks against United States on September 11, 2003, Security Council, in adopting Security Council Resolutions 1368 and 1373 was implicitly acknowledging acceptability under principle of self-defense of use of force against terrorists). But see Saura, *supra* note 2, at 19 (arguing that while Security Council Resolution affirmed need for cooperation in fight against international terrorism, nothing in resolution linked rights given to past acts of terrorism against United States).

188. See *supra* notes 20-21 and accompanying text (arguing that ICJ's decision in *Construction of a Wall Case* affected War on Terrorism because it allows ICJ to become involved in matters it previously could not and because it potentially changed interpretation of Article 51 of U.N. Charter in manner that would make U.S. action illegal).

necessary information.<sup>189</sup> Second, the ICJ has altered the requirements of Article 51 of the U.N. Charter, and held against a State taking defensive measures against non-State sponsored terrorists.<sup>190</sup> This Note will now discuss the impact of these interpretations regarding the War on Terror.

### A. *Jurisdiction*

If the General Assembly decided to challenge U.S. action during Operation Enduring Freedom in an advisory proceeding, the ICJ would be able to hear the case and address the policy decisions of the United States.<sup>191</sup> Challenging Operation Enduring Freedom would raise many of the same issues that came up during the *Construction of a Wall Case*.<sup>192</sup> One issue is whether the ICJ should answer requests made by the General Assembly to bypass the principle that a State must consent before its disputes are brought before the ICJ.<sup>193</sup> Further, the General Assembly should not request an advisory opinion so that it may later exercise its powers over the dispute based on the opinion.<sup>194</sup> Although the United States would most likely not consent to proceedings regarding its policy, the ruling in the *Construction of a Wall Case* opened the door for the ICJ to address the policy determinations of States so long as the General Assembly or Secur-

---

189. See *supra* notes 98-143 and accompanying text (explaining how recent decision not to exercise discretion in finding jurisdiction in *Construction of a Wall Case* changed interpretation of principles of judicial propriety).

190. See *supra* notes 144-87 and accompanying text (reviewing different interpretations of requirements of Article 51 of U.N. Charter and stance that ICJ took in *Construction of a Wall Case*).

191. See *supra* notes 7-10, 104 and accompanying text (stating that ICJ found that it had jurisdiction to hear *Construction of a Wall Case* even though Israel did not consent and many challenged decision arguing that it was bilateral in nature because United Nations had become involved in matter and observing that United Nations has acted to fight against international terrorism).

192. See *supra* notes 26-29 and accompanying text (observing that decisions to build separation barrier and to begin Operation Enduring Freedom were similar because both were aimed at terminating threats posed by international terrorist organizations not sponsored by individual States).

193. See *supra* notes 115-20 and accompanying text (noting that in *Western Sahara Case*, ICJ reiterated principle that exercising jurisdiction may be improper when consent is not given if it bypasses principle that States are not required to have their disputes settled by ICJ).

194. See *supra* notes 121-24 and accompanying text (remarking that in *Western Sahara Case*, ICJ stated that request would be improper if General Assembly sought advisory opinion so that it could later exercise powers over matter but that in *Construction of a Wall Case*, ICJ overturned this principle).



ity Council had issued resolutions regarding the matter.<sup>195</sup>

The decision to hear the case, however, would further jeopardize the ICJ's relationship with the United States, and with other Nations.<sup>196</sup> If the standards for judicial review set out in the *Construction of a Wall Case* are applied again, the new holding would indicate that the standards of that case could not be explained by the politically charged subject matter of the case.<sup>197</sup> Instead, it would represent the most recent elucidation of judicial propriety.<sup>198</sup> The principle of consent was one of the primary protections guaranteed in the Charter of the ICJ.<sup>199</sup> Additionally, allowing policy determinations to be reviewed before the ICJ allows all States to become involved in the decisions of another State because liberal submissions by non-parties are permitted during advisory proceedings.<sup>200</sup> This has the affect of turning the ICJ into an actor on a political stage.<sup>201</sup>

### B. Analysis of the Article 51 Defense

If the ICJ does apply its jurisprudence from the *Construction of a Wall Case* and decides that it has jurisdiction, it should decline to apply the standard of review for Article 51 that it elabo-

---

195. See *supra* notes 119-20, 131-32 and accompanying text (noting that ICJ found that lack of consent and bilateral nature of dispute did not make controversy in *Construction of a Wall Case* outside of judicial character of ICJ because United Nations had become involved in issue).

196. See *supra* notes 21, 101 and accompanying text (arguing that decision to hear *Construction of a Wall Case* jeopardized relationship of ICJ with States because it allows ICJ to rule on policy determinations of States and because principle of consent, which is no longer necessary, is one cornerstone of international adjudication).

197. See *supra* note 58 and accompanying text (maintaining that dispoitif in *Construction of a Wall Case* was political manifesto that expressed opinions of Judges, demonstrated by fact that Judges called for creation of two separate States and for negotiated peace).

198. See *supra* note 18 and accompanying text (observing that ICJ announced new principles of judicial propriety in *Construction of a Wall Case*).

199. See *supra* note 101, 140 and accompanying text (stating that consent is one of principle protections provided by Charter of ICJ).

200. See *supra* note 21 139, 140, 163 and accompanying text (observing that one consequence of permitting advisory proceedings is that all States can submit written and oral arguments, allowing them to become involved in judging another State's policy determinations).

201. See *supra* note 140 and accompanying text (noting that commentators and several Member States of United Nations believed that decision to exercise jurisdiction in *Construction of a Wall Case* inappropriately politicized ICJ and made it executive agency of General Assembly because issued dispoitif expressed political stance of ICJ which operates as judicial organ of United Nations).

rated in that case.<sup>202</sup> In the *Construction of a Wall Case*, the ICJ did not address the implications of Security Council Resolutions 1368 and 1373.<sup>203</sup> It distinguished the situation contemplated in those resolutions from that presented in the *Construction of a Wall Case*, and thus found it irrelevant to Israel's claim that it built its separation barrier in the exercise of a legitimate right of self-defense.<sup>204</sup> Because those resolutions do apply to the fight against international terrorism, the ICJ should apply the traditional Article 51 analysis to determine if the justification of self-defense applies to the use of force in Operation Enduring Freedom.<sup>205</sup>

Article 51 does not articulate what constitutes an armed attack.<sup>206</sup> Yet, international support for Operation Enduring Freedom indicates that the September 11th attacks constituted an armed attack as understood by international customary law.<sup>207</sup> Furthermore, the series of attacks perpetrated by al Qaeda against the United States were one of the gravest uses of force because they were aimed at innocent civilians, a requirement articulated in the *Nicaragua Case* and the *Oil Platforms Case*.<sup>208</sup> The U.N. Charter is not explicit in requiring that an armed attack

202. See *supra* note 172 and accompanying text (explaining that in *Construction of a Wall Case*, ICJ interpreted Article 51 of U.N. Charter to require that armed attack be attributed to State in order for another State to act in self-defense).

203. See *supra* note 172 and accompanying text (remarking that Resolutions 1368 and 1373 recognized new right of self-defense that was not addressed by majority in *Construction of a Wall Case* and that implications of ignoring these resolutions has yet to be determined).

204. See *supra* note 172 and accompanying text (noting that ICJ found that Resolutions 1368 and 1373 were not relevant because attacks came from area controlled by Israel, whereas September 11th attacks, which gave rise to resolutions, originated from area not in control of United States, and thus could not be applied to matter between Israel and Palestine).

205. See *supra* notes 185-87 and accompanying text (concluding that because Resolutions 1368 and 1373 do apply to international war on terrorism, ICJ should not apply precedent of *Construction of a Wall Case* if it reviews decision of United States).

206. See *supra* note 147 and accompanying text (discussing that U.N. Charter does not articulate the requirements of armed attack).

207. See *supra* notes 156-57 and accompanying text (concluding that ICJ stated, in *Oil Platforms Case*, that for use of self-defense to be justified by international law, force had to be in response to armed attack within meaning of Article 51 of U.N. Charter and as understood by international customary law and that international acceptance of Operation Enduring Freedom indicates that international community accepted that use of force was in accordance with international customary law).

208. See *supra* note 161 and accompanying text (maintaining that while ICJ has stated that use of force against one State must constitute grave use of force in order for use of force in self-defense to be justified, September 11th attacks and series of those

must be attributed to a State,<sup>209</sup> it is flexible enough to adapt to the changing nature of war, and it must do so in order to maintain international peace and security.<sup>210</sup> Additionally, the U.N. Security Council adopted Resolutions 1368 and 1373 that recognized both the right to self-defense and the threat posed by international terrorism, indicating that the Security Council recognized the legitimacy of the use of force against terrorist organizations.<sup>211</sup> International cooperation during Operation Enduring Freedom demonstrates that the international community now deems it appropriate to use military force against non-State actors in the face of the threats posed by international terrorism.<sup>212</sup> The idea that Article 51 of the U.N. Charter does not apply to terrorist attacks has been outpaced by modern warfare, and the potential State sponsorship of terrorist activity against its enemies.<sup>213</sup>

Operation Enduring Freedom was necessary in light of the threat posed by al Qaeda.<sup>214</sup> Because terrorist organizations such as al Qaeda demonstrate a disregard for rules of international law and for accepted moral codes, it is nearly impossible

---

perpetrated by al Qaeda constitute such grave use of force because of large toll on personal property and civilian lives).

209. See *supra* note 168 and accompanying text (observing that nothing in text of Article 51 of U.N. Charter requires that attack be attributed to another State in order for use of self-defense to be justified by U.N. Charter).

210. See *supra* notes 1, 169, 187 and accompanying text (concluding that U.N. Charter, and particularly Article 51 of U.N. Charter, is broad enough to adapt to changing nature of modern warfare and that existing framework should be used to regulate and judge all new threats posed).

211. See *supra* note 187 and accompanying text (finding that Security Council recognized that U.N. Charter is flexible enough to incorporate modern acts of warfare by linking threat posed by international terrorism as defined by Resolution 1269 to right of self-defense under Article 51 of U.N. Charter in Security Council Resolutions 1368 and 1373).

212. See *supra* notes 156, 175, and 181 and accompanying text (noting that international custom is evidence of international law and that that international community has accepted that use of force during Operation Enduring Freedom fits within parameters of Article 51 of U.N. Charter, indicating that ICJ should not find that action of United States during Operation Enduring Freedom was contrary to international law).

213. See *supra* notes 1, 176 and accompanying text (explaining that international community has become more aware of threats posed by international terrorism and U.N. Charter is flexible enough to address new threats posed by modern warfare and that ICJ should use existing framework that has been accepted by international community to address new threats posed instead of adopting new definitions which may not be accepted by community).

214. See *supra* note 162 and accompanying text (observing that for use of force to be lawful, it must be necessary response to threat posed).

to determine the extent of the threat posed by terrorist organizations.<sup>215</sup> Al Qaeda has launched a series of attacks against the United States.<sup>216</sup> The September 11th attacks prove that innocent civilians are a major target of the terrorists.<sup>217</sup> While the United States may not have been responding to an immediate, specific threat posed by al Qaeda, the history of attacks clearly justified the belief that the United States had to take forceful action to prevent additional strikes against its citizens.<sup>218</sup>

Finally, the attacks were proportional to the threat posed to the United States.<sup>219</sup> The September 11th attacks demonstrated the ability of terrorist organizations to coordinate large scale attacks that cause massive casualties.<sup>220</sup> They indicated the disregard for innocent civilian life and the willingness to sacrifice the lives of members to complete the mission.<sup>221</sup> Furthermore, the doctrine of al Qaeda and the rhetoric of its leaders indicate that its mission will not be accomplished until all U.S. citizens and others obstructing the goals of the organization have been

215. See *supra* notes 3, 60-61 and accompanying text (noting that terrorist groups do not uphold same standards as States and often target civilians and violate other principles of international law, and that al Qaeda has perpetrated series of attacks against United States and proclaimed that its work will not be done until United States surrenders or is destroyed).

216. See *supra* note 60 and accompanying text (describing series of attacks against U.S. military and civilian targets that were orchestrated by al Qaeda).

217. See *supra* notes 13, 61-68, 161 and accompanying text (concluding that September 11th attacks were final in series of attacks against United States and were targeted at civilians and demonstrated enormity of capabilities of terrorist organizations in completing their mission of fighting against all U.S. citizens until United States surrenders or is destroyed).

218. See *supra* notes 60-68, 160-61, 163 and accompanying text (finding that previously, international community has not accepted legitimacy of use of force against series of terrorist attacks, international support for Operation Enduring Freedom indicates that series of attacks were grave enough and posed serious enough threat to justify use of force against al Qaeda to protect citizens from future attacks).

219. See *supra* note 162 and accompanying text (stating that ICJ has held that State must prove its actions are proportional to threat posed to it in order to justify its use of force with Article 51 of U.N. Charter).

220. See *supra* note 161 and accompanying text (remarking that September 11th attacks reached a magnitude that had never been reached before and demonstrated ability of al Qaeda to orchestrate assaults that could cause massive casualties of both life and property).

221. See *supra* notes 61-68 and accompanying text (stating that one of objectives of al Qaeda is to kill Americans and allies and, following September 11th, organization praised those who orchestrated attacks against United States and urged others to continue with organization's mission).

killed.<sup>222</sup> Because of the gravity of threats posed by organizations such as al Qaeda, which have demonstrated a disregard for moral codes and the value of life, and potentially have access to weapons of mass destruction, it is difficult to conceive of an operation that would not be in proportion to the threat posed.<sup>223</sup>

### CONCLUSION

The ICJ holding in the *Construction of a Wall Case* undermined the prestige and credibility of the ICJ in the international community and made the world safer for terrorists and more dangerous for citizens of countries who abide by international law. The opinion in the *Construction of a Wall Case* was more a political manifesto than a judicial ruling, which represented the preconceived opinions of the United Nations regarding the Israeli-Palestinian conflict. The opinion in the *Construction of the Wall Case* should be viewed in light of the long and bloody history of the underlying conflict and should be tenuously applied to future questions before the ICJ in order to maintain the proper roles of the ICJ and of self-defense in international affairs. While negotiating a peace in the Middle East is crucial for the safety of countless citizens, allowing States to protect their citizens is an essential goal.

The ICJ should, as Article 38 of its Statute commands, look at the international consensus regarding the threat posed by terrorism and the legitimacy of using force in self-defense against the atrocious acts of international terrorists in making any future determinations regarding the applicability of Article 51 of the U.N. Charter. Terrorists demonstrate a disregard for rules of international law and for accepted moral codes. The growing strength of religious-based terrorism presents a threat that was not contemplated at the time the U.N. Charter was drafted.

The September 11th attacks demonstrate the capabilities of these organizations to orchestrate large scale attacks that cause massive casualties and immeasurable damage to property. For years, the international community has embraced the idea that

---

222. See *supra* notes 61-68 (observing that mission of al Qaeda includes destroying all Americans and all those who stand in way of completing their mission).

223. See *supra* notes 1-4, 61-68, 163 and accompanying text (concluding that new, grave threat posed by international terrorism requires States to respond to threats posed by groups who do not abide by moral codes, may have access to newer, more deadly weapons, and believe that ultimate sacrifice to be made is their own life).

targeting civilians violates principles of international law; however, terrorist organizations have adopted it as part of their policy. Ruling that actions against these reprehensible organizations violate international law allows these groups to find new ways to perpetrate even deadlier attacks against those who uphold the law, and makes innocent individuals less able to rely on their governments to provide protection.